

**Copyright Exceptions for Visually Impaired Persons: The WIPO
Treaty to Facilitate Access to Published Works by Visually Impaired
Persons**

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The Master of Philosophy

Statement of originality

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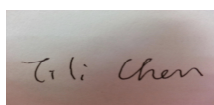
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Abstract

The advent of digital technology has improved methods of access to copyright works, and the forms of those works, for visually impaired and other reading-disabled persons. However, the distribution of copyright works via the internet may result in loss of rights by copyright holders, while at the same time increasing the risk of copyright infringement by the print-disabled. All of this has meant that legislators have had to reconsider the balance of interests between the various stakeholders in copyright protection.

Over recent years, the World Intellectual Property Organization (WIPO) has placed increasing emphasis on access to copyright works for visually impaired and reading-disabled persons, and examined why the doctrine of fair use fails to provide individuals with a defence against copyright infringement. In June 2013, the Marrakesh Treaty, or ‘Treaty for the Blind’, was adopted at the WIPO diplomatic conference. It is intended to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled—and specifically, to improve access to copyright works, while reducing the risk of copyright infringement.

The thesis evaluates the Marrakesh Treaty for people who are blind, visually impaired, or print-disabled. Its central argument is that copyright exceptions are not sufficiently broad in scope to provide appropriate access to the full range of materials which visually impaired and reading-disabled persons may require. It goes on to contend that improving licensing systems, and granting appropriate and clear remuneration to copyright holders, are more likely to encourage the supply and exchange of works in formats which are accessible to visually impaired persons.

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Chapter 1 Introduction

1.1 Background

The advent of digital technology has changed methods of access to copyright works, and the forms of those works, for many people. However, visually impaired persons can still only access text in certain forms, such as Braille and audio versions, which means that they cannot access most available published works if they are not presented in one of these forms.¹ Moreover, copyright holders can prevent readers from accessing works by applying technological protection measures (TPMs). This influences the scope of fair use and affects competition. Even if users can circumvent these TPMs—under the doctrine of fair use—copyright holders can still limit user behaviour by imposing online licensing contracts.

Therefore, the speed and convenience of distribution via the internet—such as conversions and reproductions—or the export or import of accessible format copies, may present the risk of copyright infringement. The existing statutory exceptions for the print-disabled in international copyright treaties are inadequate to meet modern needs. To protect the access rights of visually impaired persons, we need to examine why the doctrine of fair use fails to provide individuals with a defence against copyright infringement, and assert the need for the Marrakesh Treaty.

There are more than 285 million blind and visually impaired persons in the world. A World Intellectual Property Organization (WIPO) survey in 2006 found that fewer than 60 countries have special provision for visually impaired persons in their copyright laws. Furthermore, because copyright law is ‘territorial’, such limitations or exceptions do not usually cover the import or export of works converted into

¹ Wee Loon Ng-Loy, ‘Visually Impaired Persons and Copyright’ (2010) 41 ICC 377, 377.

accessible formats. Therefore, organisations in each country must negotiate licences with copyright holders to exchange special formats across borders.²

Many developed countries have incorporated limitations and exceptions into their copyright law. However, most developing countries have not yet done so because they lack the capacity and political will to amend their copyright law. Therefore, an international treaty could help to establish a consensus, covering the different legal protection issues across various countries. In June 2013, the Marrakesh Treaty was adopted at the WIPO diplomatic conference.³ The treaty aims to facilitate the availability of copyright works in accessible formats by requiring Member States to provide a limitation or exception in their national copyright laws.⁴

However, can the Marrakesh Treaty actually resolve all issues related to particular limitations or exceptions to copyright or licensing contracts for visually impaired individuals? Moreover, does the Marrakesh Treaty help to achieve revenue equilibrium between visually impaired individuals and copyright holders? What issues did the different parties consider in the negotiating processes?

WIPO commissioned several studies on limitations and exceptions to copyright, specifically for visually impaired individuals. First, a ‘Study on Copyright Limitations and Exceptions for Libraries and Archives’,⁵ by Kenneth Crews,

² World Intellectual Property Organization, ‘Background to the Diplomatic Conference’ <www.wipo.int/dc2013/en/about.html> accessed 6 August 2017.

³ The EU has signed the Marrakesh Treaty. See EUR-Lex, ‘COUNCIL DECISION of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled’ 14 April 2014 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0221>> accessed 6 August 2017.

⁴ Jingyi Li. ‘Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled - the Gap between National Laws and the Standards Required by the Marrakesh Treaty’ (2014) 45(7) IIC 740, 740.

⁵ Kenneth Crews, ‘Study on Copyright Limitations and Exceptions for Libraries and Archives’ SCCR17/2, page 71, 26 August 2008 <www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf> accessed 6 August 2017. This study provides an overview of the nature and diversity of statutory provisions in the copyright law

provides an outline of the character and mixture of legal requirements under the copyright laws of 184 member nations of WIPO in 2008. It collects library exclusions from almost all WIPO nations, offers a methodical investigation of the law, and encompasses library exceptions to prohibitions against the circumvention of TPMs. Second, a ‘WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment’,⁶ by Sam Ricketson, records the restrictions and exclusions to copyright and related rights protection that exist under international conventions. Third, a ‘Study on Copyright Limitations and Exceptions for the Visually Impaired’,⁷ by Judith Sullivan, is also notable. It suggests what might be a suitable equilibrium between the rights of copyright holders and visually impaired persons, and proposes possible solutions to the copyright problems that have been identified.

To reduce the handicapping effect of disabilities, WIPO has adopted the recommendations of these studies in the Marrakesh Treaty. The treaty creates exceptions for people who are blind, vision-impaired or print-disabled.⁸ The treaty makes general provision for visually impaired persons in order to improve access to

of the 184 countries that are members of the World Intellectual Property Organization. It gathers library exceptions from nearly all WIPO countries and provides an analytical survey of the law. This study also encompasses library exceptions to the prohibition against circumvention of technological protection measures.

⁶ Sam Ricketson, ‘WIPO Study on Copyright Limitations and Exceptions of Copyright and Related Rights in the Digital Environment’ SCCR9/7, page 76-77, 5 April 2003 <www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> accessed 6 August 2017. The Study is intended to outline the main limitations and exceptions to copyright and related rights protection that exist under the international conventions: the Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT and the WPPT.

⁷ Judith Sullivan, ‘Study on Copyright Limitations and Exceptions for the Visually Impaired’ SCCR15/7, page 12, 20 February 2007 <www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf> accessed 6 August 2017. This study builds on a number of earlier studies and reports looking at the relationship between copyright and the needs of visually impaired persons who are unable to read copyright works in the form in which they have been published. Besides this, the Study looks at what might be the appropriate balance between the interests of copyright holders and visually impaired users of copyright works.

⁸ Brook K Baker, ‘Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled’, 21 May 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267915> accessed 6 August 2017.

copyright works. Visually impaired persons should therefore be able to gain access rights using these exceptions and provisions.

1.2 Statement of the problem for the blind in the Marrakesh Treaty

It is important to define visually impaired persons, and recognise who might therefore claim access rights. The definition of a visually impaired person determines who is entitled to claim access rights in matters of copyright. However, with changes over time, and in the drafting of different treaties, the scope of beneficiaries has become broader, thus increasing the range of people falling into the visually impaired category, and of those who would therefore need assistance in accessing published materials. The scope now includes not only visually impaired persons, but also people who experience other difficulties when accessing works in traditional ways—such as in print—who may be termed ‘reading-disabled’. Therefore, in this thesis the term ‘visually impaired persons’ includes this broader category of persons who need their access to copyright-protected work to be protected by legislation.

Because methods of transmission are today very diverse, copyright works can be disseminated much more widely and could become uncontrollable. The issue of whether copyright law should provide limitations or exceptions in order to facilitate access to copyright works for visually impaired persons is relevant at the international level, especially in the digital age. Finding ways to protect the access rights of people with disabilities, while balancing the rights of copyright holders—by adjusting the scope of copyright exceptions in libraries, archives and education, teaching and research—is important if visually impaired individuals are to be offered the same access rights as sighted people. To address these complex issues, it is important that legislators not only take account of the Marrakesh Treaty, but also

consider and reconcile various societal interests when making changes to the distribution of copyright works.

There are several issues that we need to analyse and clarify when we try to improve the access rights of visually impaired persons. First, how do we define a visually impaired person in a way that means that they can be protected by exceptions to copyright? Second, what accessible formats and methods would be changed or improved by the new treaty? Third, what is the influence of copyright licences? Finally, how can we ensure visually impaired persons have the same access rights, under the Marrakesh Treaty, as other people? Thus, the aim of this thesis is to discuss the meaning of the Marrakesh Treaty for the visually impaired and how to make the treaty make the most contribution to the visually impaired. Visually impaired people have an urgent need to acquire knowledge and information. However, currently only 5% of articles published worldwide are in accessible formats, and in developing countries the figure is closer to 1% or less.⁹ The copyright limitation system can restrict the copyright from the content of the right and the exercise of the right. It incorporated the requirement of visually impaired people's equal participation in cultural life into the specific institutional norms of the copyright law and actively responded to the practical needs of visually impaired people for barrier-free versions of works. However, at present, countries in the world pay insufficient attention to the treaty and its implementation. This makes the thesis sense.

This thesis discusses the Marrakesh Treaty and tries to identify the difficulties faced, based on an evaluation of exceptions to copyright under the treaty,

⁹ Ahuja V., Marrakesh Treaty to Facilitate Access to Published Works for Visually Disabled: Putting an End to Global Book Famine. In: Sinha M., Mahalwar V. (eds) Copyright Law in the Digital World. (Springer 2017) 172.

and a balance between the protection of authors' rights and the wider public interest. Although more exceptions and fewer limitations would improve access opportunities for visually impaired persons, the rights of copyright holders must also be respected. Modifying those limitations and exceptions to copyright presents a difficult task for legislators because of the many issues which need to be considered—including economic, social welfare, technological and international issues. When considering such issues and establishing the scope of change, it is important both to protect access rights for visually impaired persons and balance the benefits to copyright holders and users.

1.3 Structure of the thesis

Chapter 2 presents an overview of current copyright exceptions for visually impaired persons. Chapter 3 discusses limitations and exceptions for visually impaired persons within the WIPO treaty. Chapter 4 analyses cross-border licensing of works. Chapter 5 describes: the management of copyright works under digital rights management (DRM); access for visually impaired persons; and the use of technological protection measures (TPMs). Finally, Chapter 6 makes recommendations for better access rights for visually impaired persons.

Chapter 2 Review of current copyright exceptions for the visually impaired

2.1 Copyright limitations in international law prior to the WIPO treaty for visually impaired persons

2.1.1 A broader scope for copyright limitations

There is a book famine affecting visually impaired persons, which makes it difficult for them to participate in social and cultural life. In many countries visual impairment is therefore often associated with low income. There is a responsibility on societies worldwide to address this problem by facilitating the number of copies of works in formats accessible to visually impaired persons.¹⁰ However, providing accessible formats for visually impaired persons normally requires works to be format shifted, and this may violate the exclusive reproduction right of copyright holders. Moreover, online access to, and cross-border licensing of these accessible format copies may further interfere with copyright holders' exclusive rights of distribution and publishing. An international legal regime to facilitate access to knowledge and culture for visually impaired persons is therefore a pressing concern.¹¹

The Marrakesh Treaty attempts to provide visually impaired persons with better access to and availability of copyright works, via limitations and exceptions. The Preamble to the treaty clearly recalls the principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights¹² and the United Nations

¹⁰ Kaya Koklu, 'The Marrakesh Treaty - Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) IIC 2014, 45(7), 737, 737.

¹¹ *ibid.*

¹² The Preamble to the Marrakesh Treaty begins by recalling that Article 1 of the Universal Declaration of Human Rights of 1948 claims that 'All human beings are born free and equal in dignity and rights', with Article 19 stating that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive

Convention on the Rights of Persons with Disabilities. Therefore, we should recognise that the policy objective of the new treaty is to create a legal system in which visually impaired persons have the same rights and protection as the sighted.

The Preamble to the treaty begins by recalling that Rule 5 of the United Nations (UN) Standard Rules on the Equalization of Opportunities for Persons with Disabilities¹³ includes the following statement:

States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.

In addition, the Convention on the Rights of Persons with Disabilities,¹⁴ also referred to in the Preamble to the Marrakesh Treaty, is an international human

and impart information and ideas through any media and regardless of frontiers'. Article 27 declares that: (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

¹³ Among the major outcomes of the Decade of Disabled Persons was the adoption of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities by the UN General Assembly on 20 December 1993 (Resolution 48/96 annex). Although not a legally binding instrument, the Standard Rules represent a strong moral and political commitment of governments to take action to attain equal opportunities for persons with disabilities. The rules serve as an instrument for policy-making and as a basis for technical and economic cooperation. The Standard Rules consists of 22 rules summarising the message of the World Programme of Action. The Rules incorporate the human rights perspective developed during the decade. The Rules aim to cover all aspects of life of persons with disabilities and consist of four chapters: Preconditions for equal participation; Target areas for equal participation; Implementation measures; and Monitoring mechanism. See United Nations, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' <www.un.org/disabilities/default.asp?id=26> accessed 27 October 2011.

¹⁴ The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol and 1 ratification of the Convention. This is the highest number of signatories in

rights initiative by the United Nations which aims to protect the rights and dignity of persons with disabilities. All members of the Convention are required to promote, protect and ensure the full enjoyment of human rights by persons with disabilities, and ensure that they have full equality under the law. Equal access to education, culture, information and communication is considered a fundamental human right. Article 30 of the Convention deals with participation in cultural life, recreation, leisure, and sport, especially in Article 30(3):

States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access to cultural materials for persons with disabilities.

Finally, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), referred to in Article 12 of the Marrakesh Treaty, states that:

The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all

history for a UN Convention on its opening day. It is the first comprehensive human rights treaty of the twenty-first century, and is the first human rights convention to be open for signature by regional integration organizations. See World Intellectual Property Organization, Standing Committee on Copyright and Related Rights (SCCR), 'Conclusion', Nineteenth Session, Geneva, 14 to 18 December, 2009
<www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_conclusions.pdf> accessed 6 August 2017.

nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

People should be equal in dignity and rights, and without discrimination, under the principle of human rights. These rights are all interrelated, interdependent, and indivisible. Non-discrimination is a cross-cutting principle in international human rights law, as it is in the Preamble to the Marrakesh Treaty. Meanwhile, human rights include both rights and obligations. States take responsibility for their obligations and duties under international law to respect, protect, and fulfil human rights.¹⁵ According to Article 30 of the Convention on the Rights of Persons with Disabilities, and Article 13 of the ICESCR, we should recognise that visually impaired persons should have the same rights and obligations as other people, under human rights principles, because all human beings are born free and should be treated fairly.

To comply with the Universal Declaration of Human Rights and the international conventions quoted above, it is evident that all members should ensure equal opportunities for all in terms of access to education, culture, and information. However, visually impaired persons may not be able to access works if they have inadequate assistive technologies or resources, due to economic factors. Visually impaired persons should be granted legal right of access to information that they need in their life, and specific exceptions should be enacted for them. Therefore, a broader scope for copyright exceptions is needed if visually impaired persons are to have the same access rights as sighted people.

¹⁵ ‘What are Human Rights?’ <www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 6 August 2017.

2.1.2 Adequacy of the Three-Step Test

The Three-Step Test was formally introduced in 1967, in Article 9(2)¹⁶ of the Berne Convention, as a general principle for deciding whether the right of reproduction may be restricted in national law under different circumstances. Currently, the test is applicable not only to exemptions to reproduction copyright but also to exemptions for all other exclusive rights. Under the Berne Convention, Contracting States could decide themselves whether their own laws complied with the Three-Step Test.

In international copyright law, the ‘Three-Step Test’ limits the ability of states to introduce and maintain exceptions to the exclusive rights of copyright holders.¹⁷ In order to avoid the abuse of limitations and exceptions, the Marrakesh Treaty emphasises the importance of the Three-Step Test. The three steps which qualify this statement are: (1) in certain special cases; (2) which do not conflict with the normal exploitation of a work; and (3) which do not unreasonably prejudice the legitimate interests of the author (or other rightholders).

Giving due consideration to each of the three steps promotes a more inclusive discussion around the most appropriate model for intellectual property legislation.¹⁸ People to whom the exemption applies are defined with the Marrakesh Treaty’s beneficiaries from the broader reading population. Any exemption for the benefit of visually impaired persons is likely to meet the “special” in a normative sense¹⁹—the first step—regarding to the requirement that an exception or limitation

¹⁶ Article 9(2) of the Berne Convention: ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’.

¹⁷ Jonathan Griffiths, ‘The “Three-Step Test” in European Copyright Law – Problems and Solutions’ (2009) IPQ 428, 429.

¹⁸ Robin Wright, ‘The “Three-Step Test” and the Wider Public Interest: Towards a More Inclusive Interpretation’ (2009) 12(6) JWIP 600, 618.

¹⁹ Simonetta Vezzoso, ‘The Marrakesh Spirit – a Ghost in Three Step?’ (2014) 45 IIC 796, 814.

in national legislation must be a “special” case, the WTO panel interpreted it as meaning that “the exception or limitation should be narrow in quantitative as well as a qualitative sense.”²⁰ The concept of normal exploitation—the second step—would not extend to situations that copyright holders never had any intention of exploiting, and relates to the doctrine of fair use. This step is related with the issue of commercial availability. In essence, the commercial availability of accessible format copies should block the enjoyment of limitations and exceptions for the visually impaired persons. Authorised entities would have been obliged to check whether copies of the work in an accessible format were available on the market before making copies and supplying them to the visually impaired persons. However, the World Blind Union considered that the requirement to check for commercial availability in another country in the context of the cross-border supply of accessible format copies was a serious obstacle to the fulfilment of the aim of the Marrakesh Treaty. According to the Article 4(4) of the Marrakesh Treaty, members may foresee that, if the work “in the particular accessible format” is already available in the market, the limitation and exception does not apply. Due to the absence of the mandatory reference to commercial availability in the Marrakesh Treaty, it would seem difficult for right holders to argue that the requirement, based on the second step of the test, still needs to be observed by members implementing the Marrakesh exemption.²¹ How copyright holders are compensated for the use of their work by visually impaired people—the third step—is the critical test, and commercial availability featured high on the list of issues discussed during the drafting of the Marrakesh Treaty. In practice, libraries and related organisations don’t have the

²⁰ WTO Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R, para. 6. 109, June 15, 2000.

²¹ Vezzoso (n 19) 815-816.

resources to check commercial availability.²² Under the third step, therefore, there is scope for countries to consider whether copyright holders should be entitled to prevent access, and/or be compensated for allowing access to visually impaired people.²³ Under the Marrakesh Treaty, members can choose to provide in national legislation for a remunerated statutory licence instead of a pure exception. It also gives treaty members the right to apply parts of the treaty as appropriate in their national circumstances.

The Three-Step Test affects the implementation of measures at various regulatory levels, and across different legal systems. At an international level, it affects state autonomy in drafting domestic legislation, while at a domestic level it may either be incorporated directly into legislation, or just act as an aid to the interpretation of legislation.²⁴ Specifically, the Three-Step Test sets limits on how states legislate for limitations and exceptions, and it has proved to be an effective way of establishing balance in the field of copyright.²⁵

Although the Three-Step Test is intended to prevent the excessive application of limitations and exceptions, there is no corresponding mechanism to prohibit an overly narrow or restrictive approach. For this reason, the Three-Step Test needs interpretation to ensure a proper and balanced application of limitations and

²² Catherine Saez, Intellectual Property Watch, 'In UN Talks on Treaty for the Blind, Concern About Heavy Focus on Rightholders' Interests' 2013
<<https://www.ip-watch.org/2013/04/20/in-un-talks-on-treaty-for-the-blind-concern-about-heavy-focus-on-rightholders-interests/>> accessed 6 January 2017.

²³ Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print-Disabled* (Cambridge University Press 2017) 72-73.

²⁴ Christophe Geiger, Jonathan Griffiths and Reto M Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 IIC 707, 710. See also Christophe Geiger, Jonathan Griffiths and Reto M Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 30 EIPR 489, 494.

²⁵ Mihály J. Ficsor, 'Short Paper on the Three-Step Test for the Application of Exceptions and Limitations in the Field of Copyright' November 2012
<<http://www.copyrightseesaw.net/data/documents/documents/0/e/b/0eb32b716fcaa400dd4cf398256e3fa8.doc>> accessed 6 June 2018.

exceptions—essential if an effective balance of interests is to be achieved.²⁶ Similarly, consideration needs to be given to whether the Three-Step Test overlooks existing limitations and exceptions to copyright, and whether stricter conditions need to be applied to them.²⁷

Limitations and exceptions are the most important legal mechanism for reconciling copyright with the individual and collective interests of the general public. Therefore the Three-Step Test should not only take into account the interests of copyright holders, it should also consider the interests of third parties when determining the scope of limitations and exceptions—even if those third party interests are not explicitly mentioned in the Three-Step Test itself.²⁸ In order to properly address the interests of those third parties, rather than taking a step-by-step approach, the Three-Step Test needs to be applied using an informed, holistic approach which accommodates any conflicting results arising from the application of individual steps. The test does not preclude this approach, however it has often been overlooked in decided cases.²⁹ Used in this way, the Three-Step Test can facilitate the balancing of interests between different classes of rightholders, and between rightholders and the wider general public.

In light of changing times and technological developments, the Three-Step Test needs to adopt a flexible approach to the evolution of distribution methods for copyright material. The test should not encourage limitations and exceptions to be

²⁶ Max Planck, Electronic Frontier Foundation, ‘The Three-Step Test’ Interests’ 2013
<https://www.eff.org/files/filenode/three-step_test_fnl.pdf> accessed 6 June 2018.

²⁷ Baker (n 8).

²⁸ Geiger, Griffiths and Hilty ‘Towards a Balanced Interpretation of the “Three-Step Test” in Copyright Law’ (n 24)493.

²⁹ Christophe Geiger, Reto M. Hilty, Jonathan Griffiths and Uma Suthersanen, ‘A Balanced Interpretation of the “Three-Step Test” in Copyright Law’, 2010
<<https://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>> accessed 6 June 2018.

interpreted narrowly. Instead, they should be interpreted according to their objectives and purposes. The Three-Step Test should not prevent legislatures from introducing open-ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable. The test should also allow existing statutory limitations and exceptions to be applied in similar circumstances, *mutatis mutandis*, and allow new limitations or exceptions to be created.³⁰

As an example of this flexible approach, the German Federal Court of Justice addressed the public interest in unhindered access to information in a 1999 decision concerning the Technical Information Library in Hannover.³¹ It supported the Library's practice of copying and dispatching scientific articles, following a request from individuals or commercial organisations. Under Section 53 of the German Copyright Act,¹²⁸ authorised users need not necessarily produce the copy themselves but are free to ask a third party to make the copy on their behalf. The Court acknowledged that the dispatch of copies by the Library came close to publishing a work, however it did not prohibit the practice as this would have been in conflict with the work's normal exploitation. Instead, the Court established an obligation to pay equitable remuneration from the Three-Step Test as compensation to copyright holders. In this way, the Court facilitated the extension of the information service.³²

This example illustrates how the Tree-Step Test can be adapted to different circumstances, using a holistic approach to achieve an effective balance of interests.

³⁰ *ibid.*

³¹ BGH, Urteil vom 25. 2. 1999 - I ZR 118/96, JZ 1999, 1000.

³² Christophe Geiger, Daniel J. Gervais, and Martin Senftleben. 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *Am. U. L. Rev.* 581, 618.

The Marrakesh Treaty is the first treaty to mandate that countries adopt the limitations and exceptions that the Three-Step Test framework permits. No longer can a country decide whether to adopt limitations or exceptions which benefit visually impaired persons; the treaty requires countries to implement limitations or exceptions for this specific purpose. The treaty establishes two main goals: first, it aims to facilitate easier and more rapid access to materials protected by copyright for visually impaired persons; and second, it aims to protect the rights of copyright holders. To achieve these goals the treaty addresses two sets of problems: first, it makes provision for limitations and exceptions to facilitate access to materials within each country; and second, it provides a mechanism for cross-border exchange of materials, in order to maximise worldwide access to materials.³³

With its flexible approach to the Three-Step Test, the Marrakesh Treaty recognises, in Article 4(3) and 5(3), that members may fulfil their obligations by providing other limitations and exceptions. Indeed, the flexibility of the Three-Step Test for this purpose is addressed in the treaty's Preamble.³⁴ However, although the Three-Step Test is referenced throughout the Marrakesh Treaty, the World Blind Union considers that it may not be helpful for the blind in all situations.³⁵

2.1.2.1 International copyright law

According to Article 11 of the Marrakesh Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that a Contracting Party has under

³³ Marketa Trimble, 'The Marrakesh Treaty and the Targeted Uses of Copyright Exhaustion' 2015 <<http://scholars.law.unlv.edu/rscholars/173>> accessed 6 August 2017.

³⁴ Laurence R. Helfer, Molly K. Land, Ruth L. Okediji and Jerome H. Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) 71.

³⁵ World Blind Union, 'The Treaty of Marrakesh Explained', 27 May 2009 <www.worldblindunion.org/english/news/Pages/The-Treaty-of-Marrakesh.aspx> accessed 6 August 2017.

the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty (WCT).

The Berne Convention allowed an equitable and sufficiently flexible legal framework for its members to introduce exceptions to exclusive rights in national copyright legislation. Such exceptions in national legislation were based on clearly defined appropriate conditions and met the Three-Step Test of the Berne Convention.³⁶ The Marrakesh Treaty builds on the general exception in Article 9(2) of the Berne Convention:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Moreover, Article 9(1) of TRIPS states that ‘Members shall comply with Articles 1 through 21 of the Berne Convention (1971)...’, therefore members should also comply with Article 9(2) of the Berne Convention. Article 13 of TRIPS states that:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.

³⁶ SCCR, ‘Working Document on an International Instrument on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities’ SCCR/23/7, 21 to 25, 28, 29 November and 2 December 2011 <http://wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_7.pdf> accessed 6 August 2017.

Although international law, as described above, addresses limitations and exceptions to copyright, the Berne Convention mainly focuses on rights of reproduction. Users may only defend any infringement under the doctrine of fair use. The protection of access rights for visually impaired persons is therefore generally inadequate, and specifically unsuited to new and online methods of access. The Marrakesh Treaty therefore establishes minimum international standards for copyright exceptions, and represents a significant development in international copyright. Copyright exhaustion is an important system to balance the interests between creators and the public. In the changing times, it has been playing an important role in the requirement of fairness and justice of copyright law. Nowadays, most countries in the world have recognized this system and clearly defined it. Although the specific provisions of this system are not uniform, the principle of copyright exhaustion has been playing an important role in the copyright system. In the field of copyright, countries and regions that agree with the principle of first sale exhaustion in the international scope allow parallel import of copyright. On the contrary, if the principle of first sale only applies to copies of works legally produced and first sold in China, parallel import of copyright is considered illegal. In *Kirtsaeng v. John Wiley & Sons, Inc.*³⁷, The US court ruled that American companies cannot prevent legally produced copies of their work from re-entering the United States for sale because of copyright infringement. In the EU, no digital exhaustion of works is protected by copyright. However, users can download and install software from the Internet. After users pay a reasonable price in one time, such behaviour constitutes distribution and the distribution right shall be exhausted.³⁸

³⁷ 133 S.Ct. 1351 (2013) (Sup Ct (US)).

³⁸ *UsedSoft GmbH v Oracle International Corp* (C-128/11) [2012] All E.R. (EC) 1220.

2.1.2.2 The EU Directive

Compared with Berne and TRIPS, the EU Directive provides a more effective law for people with a disability. EU Directive 2001/29/EC—on copyright in the information society—harmonises copyright laws and tries to provide more protection for both copyright holders and the interests of the public, through limitations and exceptions.³⁹ The permitted use for visually impaired persons must not conflict with normal exploitation or unreasonably prejudice the legitimate interests of the right holders. Moreover, the accessible work must not impair the integrity of the work or other subject-matter, while taking due account of the changes necessary to make the work or other subject-matter available in other formats. According to the EU Directive, it is also prohibited to contractually exclude the effectiveness of such authorised use and may not impose additional requirements for the application of the exception.

Article 5(3)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (the EU Copyright Directive), states:

3. Member States may provide exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: ... (b) uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability; 4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly an exception or limitation to the right of distribution

³⁹ Iheanyi Samuel Nwankwo, 'Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons' (2011) 2 JIPITEC 203, 210.

as referred to in Article 4 and to the extent justified by the purpose of the authorised act of reproduction.

Above all, it is clear that the issue of people with a disability is emphasised by EU Member States.

Although the EU Directive takes note of the rights of the disabled—in order to promote effective and adequate access—more specific limitations and exceptions to copyright are needed for visually impaired persons if the legislation is to ensure equal opportunities for the blind and others, especially on the question of cross-border licensing. Therefore, EU ratification of the Marrakesh ‘Treaty for the Blind’ can be regarded as an important advance in sharing or making accessible copies for visually impaired persons.⁴⁰

EU has only recently made new progress on relevant legislation. In 2017, the European Parliament approved the Directive and the Regulation that implement the Marrakesh Treaty to facilitate access to published works for visually impaired persons. Actually, EU has signed the Marrakesh Treaty in 2014. At the time, there were 11 member states of the Treaty but none was an EU member state.⁴¹ However, at least seven member states, while acknowledging the importance of the Marrakesh treaty, believe that it falls within the common competence of the EU and member states. The opposing Member States argued that the Marrakesh Treaty imposed an

⁴⁰ The EU ratification of the Marrakesh Treaty has been delayed by a dispute as to whether the Treaty is a mixed agreement or falls under the sole competency of the EU. On 20 May 2015 the European Council of member states adopted a decision asking the European Commission to draft legislation on Europe’s ratification of the Marrakesh Treaty on increasing access to publications for blind and visually impaired readers. See EUR-Lex, ‘Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled’ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014PC0638>> accessed 6 August 2017.

⁴¹ Ana Ramalho, ‘Signed, sealed, but not delivered: the EU and the ratification of the Marrakesh Treaty’ (2015) 6(04) *European Journal of Risk Regulation* 629, 631.

obligation to make exceptions to the right to reproduce, distribute and make available to the public copies of accessible formats was went beyond the optional character set in Article 5 paragraph 3(b) of Directive 2001/29/EC. The Directive and the Regulation made it clear that the Marrakech Treaty should be implemented in the European Union for the benefit of the blind and visually impaired. They allow cross-border transfers of copies of copyright works in barrier-free formats between EU Member States, even if they have not ratified, and with other countries that have ratified the treaty. It allows but does not authorise Member States to provide exceptions to national laws on the right to reproduce, to communicate with the public, to make available for use for the benefit of disabled persons, which are directly related to disability and are of a non-commercial nature, to some extent required by specific disability. Accordingly, the opposing Member States believed that the EU has not become fully competent in accordance with Article 3, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU). Doubts were also expressed about the use of Article 207 of the TFEU as the legal basis for signing and ratifying the Marrakech Treaty. At the plenary session of the European parliament on 29 April 2015, further attention was paid to the debate over the EU's ability to follow the Marrakech Treaty. Some Member States again objected to ratifying the Marrakech treaty under the exclusive jurisdiction of the EU as a hybrid agreement. That is, both the EU and the Member States have jurisdiction over the Treaty, in which case the treaty must be ratified separately by the Member States and the EU.⁴² Thus, in May 2015, the European Council adopted a resolution asking the European commission to submit a proposal aimed at amending the EU's existing legal framework to bring it into line with the Marrakech Treaty.⁴³ Not until recently, the

⁴² Piet Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011), 212-214.

⁴³ Ramalho (n 41).

Regulation 2017/1563 stipulates that EU Member States could conduct cross-border exchanges with third parties under the Marrakech Treaty. The Directive 2017/ 1564 stresses the need to make exceptions in the EU that allow the creation of special formats without the consent of the owner. This includes an emphasis on harmonising exceptions in order to ensure that copies of EU Directive can be obtained within the EU without the permission of the right holder. Like all EU legal harmonisation, copyright law harmonisation involves not only legal systems and traditions but also the process of economic and political power play.⁴⁴ The reason the Marrakesh Treaty was formalised as a directive by the EU years later was that publishers feared financial losses. Its signing was caricatured as a political stunt.⁴⁵ Legal schemes have been proposed to make publishers compensated while Member States implement the new Directive. This has been criticised as incompatible with the objectives of the Marrakesh Treaty of the right to read. In Europe, a lot of money has gone into creating easy-to-read versions. These non-profit companies rely on donations, but it is not in the donor's interest to use the money to compensate publishers instead of creating more books.⁴⁶

2.2 National law in the United Kingdom

The issue of exceptions to copyright for visually impaired persons needs to address: how the beneficiary is defined; what type of copyright works can be copied or otherwise used and by what type of organisation; whether activity must be of a non-commercial nature; and what type of accessible copies can be made according to national laws.⁴⁷ In order to implement the EU Copyright Directive, the UK has

⁴⁴ Koklu (n 10).

⁴⁵ *ibid.* The Marrakesh Treaty shock the interest of the publishers. In the EU, politics and capital go hand in hand. So it was not hard to understand why publishers can influence government decisions.

⁴⁶ *ibid.*

⁴⁷ Sullivan (n 7) 9.

enacted relevant copyright legislation and adopted different protective methods for visually impaired persons. Moreover, the legislation requires copyright holders to be responsible for establishing licences for access—otherwise, copyright holders must allow visually impaired persons to have right of reproduction under the doctrine of fair use (or ‘fair dealing’ in the UK). Although the UK will leave the EU on 31 October in 2019, the EU Regulation and the UK’s implementation of the EU Directive will be retained in UK law. References to the EU will be removed or substituted to ensure that the UK’s implementation of the Treaty continues to work as intended after Brexit. Visually impaired persons or authorised bodies will, under UK law, continue to be able to make, distribute, and import or export with Treaty countries accessible format copies of copyright works.⁴⁸

The balanced design of legislation in the UK could be a reference for other countries, however licensing schemes also need to address issues at the international level in order to promote maximum opportunities for accessing works. In view of this, the Marrakesh Treaty, under Article 5, addresses the cross-border exchange of accessible format copies, and describes schemes to solve the issue.⁴⁹

2.2.1 The Copyright (Visually Impaired Persons) Act 2002

The National Library for the Blind (NLB) produces—for loan or sale—mainly Braille versions of books that sighted people can obtain easily. However, this has led

⁴⁸ Intellectual Property Office, ‘Changes to Copyright Law in the Event of No Brexit Deal’, 5 September 2019
<<https://www.gov.uk/government/publications/changes-to-copyright-law-in-the-event-of-no-deal/changes-to-copyright-law-in-the-event-of-no-deal>> accessed 26 September 2019.

⁴⁹ The UK Government signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled on 28 June 2013; and has stated that it intends to ratify the Treaty at the earliest opportunity. The Government is discussing with EU Members the extent to which common action is required to ensure a coherent ratification of the Treaty across Europe. See Parliamentary Business, ‘Publications: Visual Impairment: Written question - 223012’, 3 February 2015
<<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-02-03/223012/>> accessed 6 August 2017.

to certain problems—such as ensuring rights are retained—since an alternative format might be produced by a publisher who has already been given permission, even though the permission might relate to quite different restrictions.

After the Copyright (Visually Impaired Persons) Act came into force in October 2003, the situation was greatly alleviated. The Act made an exception to copyright to enable such activity, but at the same time it also made provision for rightholders to set up a licensing scheme to override any exception, if the licensing scheme was not more restrictive than the exception which is permitted by legislation. The Copyright Licensing Agency (CLA) set up a licensing scheme covering the making of alternative formats for books and journals. A separate scheme operated by the Music Publishers Association (MPA) exists for sheet music.

A number of organisations—the Royal National Institute of Blind People (RNIB), the NLB, rightholder organisations, including the Publishers Association and Publishers Licensing Society, and other trade bodies including the Booksellers Association and Book Industry Communication—also planned a project to determine the scope of work that can be made available by publishers, to the RNIB, in digital form for conversion into large print, Braille, and audio accessible copies.⁵⁰

Depending on their individual circumstances, visually impaired persons can access works using large print, audio-books, electronic books, and other methods, but due to budgetary pressures, the RNIB and NLB can only produce limited quantities using traditional methods.⁵¹ Although the Copyright (Visually Impaired Persons) Act 2002 has helped to reduce the costs of production, the main opportunity has been

⁵⁰Sullivan (n 7)82-4.

⁵¹ David Bradshaw, 'Making Books and Other Copyright Works Accessible, without Infringement, to the Visually Impaired: A Review of the Practical Operation of the Applicable, and Recently-Enacted, UK Legislation' (2005) IPQ 335, 357.

in taking advantage of technology. Previously, in order to obtain accessible versions for visually impaired persons, it was necessary to scan the print version first, in order to create a digital file, then use the digital file to produce Braille via electronic Braille printers. However, today, before text is printed it exists in an electronic format, and this can be transferred directly into a form accessible for visually impaired persons. This technology has reduced total production costs.⁵²

2.2.2 Procedural implementation of copyright exceptions for visually impaired persons

In the UK, the Equality Act came into force in October 2010, replacing the Disability Discrimination Act (DDA) in England, Scotland and Wales. The Equality Act requires website providers to think in advance about what disabled people might reasonably need, rather than wait until a disabled person wants to use their services.⁵³ In view of this, protection for people with disabilities has been taken seriously in recent years, and digital technology has played an important role.

2.3 National law in the United States

There is currently no specific legislation for visually impaired people in the United States, although the Marrakesh Treaty Implementation Act is in the process of being passed through Congress. Exceptions under the Copyright Act will be introduced to establish access rights and avoid infringements of copyright.

The doctrine of fair use is the most important of these exceptions, and Section 107 of the US Copyright Act of 1976 regulates the main points of the fair use

⁵² *ibid* 357-8.

⁵³ 'UK Law for Websites', 21 April 2011

<www.rnib.org.uk/professionals/webaccessibility/lawsandstandards/Pages/uk_law.aspx> accessed 6 August 2017.

doctrine. According to Section 107, there are four factors in the fair use exception: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. In judging a case of infringement, these four factors should be considered comprehensively and carefully, to evaluate their impact on users and copyright owners.

2.3.1 The case of Authors Guild v HathiTrust⁵⁴

In 2008, the HathiTrust Digital Library (HDL) was created by a group of participating universities. HathiTrust used digital copies to create a database for full-text searching by the general public, and to permit library users with print disabilities to have access to full texts of works. Moreover, HDL allowed libraries to replace their original copies that were lost, destroyed, or stolen, where a replacement was unobtainable at a fair price elsewhere.

In applying the four factors of the fair use doctrine, firstly, the district court concluded that “the use of digital copies to facilitate access for print- disabled persons is a transformative” use. Secondly, the disabled can obtain access to copyrighted works of all kinds, and there is no dispute that those works are of the sort that merit protection under the Copyright Act. Thirdly, the text files are required for text searching and to create text-to-speech capabilities for the blind and disabled. But the image files will provide an additional and often more useful method by which many disabled patrons can obtain access to these works. Many legally blind patrons are capable of viewing these images if they are sufficiently magnified or if

⁵⁴ 755 F.3d 87 (2d Cir. 2014).

the color contrasts are increased. Gaining access to the HDL's image files—in addition to the text-only files—is necessary to perceive the books fully. Consequently, it is reasonable for the libraries to retain both the text and image copies. Finally, there is still few accessible works for the visually impaired persons. Therefore, weighing the four factors together, the Court of Appeal conclude that the doctrine of fair use allows the libraries to provide full digital access to copyrighted works to visually impaired persons. This meant that users could transfer the formats of works and provide such versions for visually impaired persons if such behaviours are under the doctrine of fair use.

In 2014, the Court of Justice of the European Union (CJEU) also ruled that libraries should be allowed to digitise books without consent from publishers, but that copying an electronic book to a USB stick, or printing it, should be illegal.⁵⁵

Notwithstanding these judgements, the long-term legal position remains unclear if libraries have to obtain a judgement under the fair use doctrine for any act of digitisation. A clearer system is needed if such disputes are to be avoided.

2.4 National law in Taiwan

In 2014, in response to Article 4 of the Marrakesh Treaty, Taiwan's legislators raised an amendment to the Copyright Act to address access rights for disabled people. The amendment extended the range of beneficiaries and accessible formats. As well as granting access rights for disabled people, the legislation extended rights to local and central government agencies, non-profit organisations, and all legally established schools.

⁵⁵ Loek Essers, 'Libraries May Digitize Books Without Permission, EU Top Court Rules', 11 September 2014
<<https://www.pcworld.com/article/2606132/libraries-may-digitize-books-without-permission-eu-to-p-court-rules.html>> accessed 1 May 2018.

2.5 WIPO Standing Committee on Copyright and Related Rights (SCCR)

Although there are several international laws dealing with limitations and exceptions to copyright, they are inadequate in that they do not address the problem of trans-borders licensing. Due to the development of new technologies, increasing attention has been focussed on the need to update existing limitations and exceptions to copyright. Such limitations and exceptions are used by legislators to ensure a balance of interests, and the doctrine of fair use could be used to justify changes.

However, the balance of interests has been challenged by the development of technology and its consequences. For example, new assistive technologies used by visually impaired people now need to be included: assistive technology programmes on personal computers can speak on-screen text; personal digital assistants (PDAs) and e-book readers provide portable access to books; optical character recognition (OCR) systems can scan printed material and speak the text.⁵⁶

Copyright is not intended to impede access to information—the essence of copyright is to strike a balance between different interests.⁵⁷ The issue of visually impaired persons needs to be examined more carefully, in terms of limitations and exceptions, in order to accord with the objectives of copyright.

2.5.1 Limitations and exceptions to copyright

In recent years, WIPO has addressed the issue of limitations and exceptions to copyright via its Standing Committee on Copyright and Related Rights (SCCR).⁵⁸

⁵⁶ American Foundation for the Blind, 'Assistive Technology' <<http://www.afb.org/info/living-with-vision-loss/using-technology/assistive-technology/123>> accessed 6 August 2017.

⁵⁷ Christophe Geiger, 'The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information' (2010) IPQ 1, 3-6.

⁵⁸ *ibid* 7.

The SCCR has considered the issue, with a focus on educational activities, libraries, and archives, and disabled persons—especially visually impaired persons.⁵⁹

In 2004, Chile proposed that ‘limitations and exceptions to copyright and related rights’—for the purposes of education, libraries and disabled persons—be put on the SCCR agenda. The issue was noted and then discussed internationally. In 2006, WIPO presented its ‘Study on Copyright Limitations and Exceptions for the Visually Impaired’. In 2009, Brazil, Ecuador and Paraguay proposed the ‘WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons’, relating to the limitations and exceptions treaty proposed by the World Blind Union (WBU). Finally, in 2013, WIPO passed the Marrakesh Treaty in order to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled (the ‘Treaty for the Blind’).

The treaty has a number of exceptions that are easier to implement and, as they are on a non-profit basis, do not require royalty payments to authors. The exceptions may also be applied to for-profit organisations, but only when an accessible format is ‘not reasonably available in an identical or largely equivalent format’ from the copyright owner. However, the entity must provide both notice and ‘adequate remuneration’ to the copyright owner. The non-profit exception is mandatory, but members are permitted to opt out of the for-profit exception.⁶⁰

The SCCR provides clear evidence that WIPO has admitted the need to introduce the Marrakesh Treaty in order to provide solutions for visually impaired

⁵⁹ Maciej Barczewski, ‘From Hard to Soft Law – A Requisite Shift in the International Copyright Regime?’ (2011) 42 ICC 40, 45-46.

⁶⁰ ‘Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons’, SCCR/19/13, Annex Page 4, 11 December 2009 <www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_13.pdf> accessed 6 August 2017.

persons, and address the challenges and opportunities presented by economic, social, cultural, and technological developments. In addition, the Marrakesh Treaty addresses the need to maintain a balance between the rights of authors and the wider public interest, particularly in education, research, teaching, and access to information.

2.5.2 Cross-border issues in copyright, and the ‘borderless’ internet

Although visually impaired persons can take advantage of exceptions in copyright law, there is different legislation in different countries. Therefore, in the digital age, users must always take a risk when accessing information. To avoid the risk of cross-border copyright infringement, international licensing of copyright works could provide a means of exchanging accessible formats for visually impaired persons. Moreover, this could permit the distribution of accessible format copies exclusively to beneficiary persons. However, a treaty which established harmonised standards would be a better solution to protect the exclusive rights of copyright holders.

Article 8 of the WIPO Copyright Treaty (WCT) states that:

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 5(1) of the WIPO Marrakesh Treaty states that:

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party.

Article 6 of the WIPO Marrakesh Treaty specifies that:

To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorised entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons without the authorisation of the rightholder.

Concerning the issue across jurisdictions, the territorial nature of copyright and related laws can be an obstacle to cross-border exploitation of work. Therefore, the SCCR is also aware that national copyright legislation is territorial, and where activity is undertaken across jurisdictions uncertainty regarding the legality of that activity undermines the development and use of new technologies and services that can potentially improve the lives of people with disabilities.

The refinement includes working with publishers to increase the number of accessible published books, and with WIPO to improve copyright law and facilitate the sharing of accessible works between different countries.⁶¹ In order to reach a balance between the interests of content creators and users, the WBU seeks to ensure

⁶¹ World Blind Union, 'Campaigns' <www.worldblindunion.org/en/our-work/campaigns/Pages/default.aspx> accessed 27 October 2011.

that all copyright legislation considers the special needs of visually impaired persons to have access to information in an alternative format of choice at a fair price.⁶² The WBU proposed ‘Books Without Borders’, which aims to solve the problem of sharing accessible works worldwide. The WBU has lobbied over recent years and wants WIPO to agree an international treaty in order to allow more accessible books to be made and sent across borders in formats such as large print, audio, Braille and DAISY.⁶³

2.6 Conclusion

Cross-border issues, conflicting private and public interests, and the doctrine of fair use are all relevant to the question of copyright exception for visually impaired persons. The Marrakesh Treaty provides specific rules in Article 5 and 6—regarding domestic and cross-border limitations and exceptions—to address the otherwise inadequate exceptions for visually impaired persons.

The treaty not only focuses on copyright exceptions to facilitate the creation of accessible versions of books and other copyright works, it also sets a norm for countries to have domestic copyright exceptions to allow the import and export of such materials, and the distribution of accessible format copies exclusively to beneficiary persons.

⁶² ‘WBU External Position Statement’

<www.worldblindunion.org/en/our-work/position-statements/Documents/Access%20to%20Information.doc> accessed 27 October 2011.

⁶³ World Blind Union, ‘On Track for a “Books Without Borders” Treaty’, 30 June 2011

<www.worldblindunion.org/en/our-work/campaigns/Documents/World%20Blind%20Union%20-%20Press%20Release%2030%20June%202011.doc> accessed 27 October 2011.

Chapter 3 Limitations and exceptions within the WIPO treaty for visually impaired persons

The Marrakesh Treaty⁶⁴ is the first multilateral instrument that establishes harmonised standards for limitations and exceptions. It requires parties to create exceptions to domestic copyright laws in order to expand access to information for visually impaired persons. Moreover, it allows for the cross-border exchange of accessible format works by organisations that serve the treaty's target beneficiaries, and helps to avoid the misdistribution of published works.⁶⁵

The Marrakesh Treaty was signed in Marrakesh, Morocco, on 28 June 2013. It focuses on copyright exceptions to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled (the 'Treaty for the Blind'), to improve access to copyright works for visually impaired persons.

3.1 The definition of beneficiary persons in the Marrakesh Treaty

Article 3 of the WIPO Marrakesh Treaty specifies that a beneficiary person is a person who:

(a) is blind; (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability, and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the

⁶⁴ The Marrakesh Treaty signed in Marrakesh, Morocco, on 28 June 2013. It focuses on copyright exceptions to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled (the "Treaty for the Blind") to improve access to copyrighted works for visually impaired persons.

⁶⁵ Jeremy De Beer, 'Applying best practice principles to international intellectual property lawmaking' (2013) IIC 2013, 44(8), 884, 898.

extent that would be normally acceptable for reading, regardless of any other disabilities.

The WBU proposal (see section 2.5.1) was the main influence on the protection of access for visually impaired persons. Article 15, concerning disabilities, states:

(a) For the purposes of this Treaty, a ‘visually impaired’ person is: 1. a person who is blind; or 2. a person who has a visual impairment which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no visual impairment and so is unable to access any copyright work to substantially the same degree as a person without a disability.

The treaty extends the interpretation of visually impaired persons—to cover disabled people or people with either physical or mental disabilities—in that it takes account of a wider range of difficulties that people may experience when they wish to access information. The treaty includes people who are blind, visually impaired, reading-disabled, or have a physical disability. Compared with the proposal by the WBU, it broadens the scope of beneficiaries of exceptions, and could be more helpful to people with any disability.

3.2 Definitions of visually impaired person in national legislation

3.2.1 National law in the United Kingdom

In advance of contracting parties adopting the Marrakesh Treaty into national legislation, we examine current legislation in the UK, and how the Marrakesh Treaty provides an international minimum standard.

The 2002 amendments to the Copyright, Designs and Patents Act 1988 (CDPA) incorporate into UK law the permitted exceptions identified in Article 5(3)(b) of the EU Copyright Directive.⁶⁶

Under Section 31F(9) of the CDPA, a visually impaired person is defined as someone:

(a) who is blind; (b) who has an impairment of visual function which cannot be improved by the use of corrective lenses to a level that would normally be acceptable for reading without a special level or kind of light; (c) who is unable, through physical disability, to hold or manipulate a book; or (d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading. Visually impaired persons are not only those whose visual functions are impaired, but also those who cannot hold a book because of severe rheumatoid arthritis.⁶⁷

According to Section 31F(9), visually impaired persons should include those with physical and mental disabilities, therefore the CDPA definition of visually impaired persons is similar to the definition in the treaty. However, the RNIB considered that, in practice, this definition of visually impaired persons might give rise to problems. For example, before the 2002 amendments to the CDPA came into force, the RNIB provided services—such as transferring books into audio formats—for both visually impaired persons and non-visually impaired persons suffering from dyslexia. The definition in Section 31F(9) only includes physical disabilities—relating to holding or manipulating a book, or the focus or movement of a person’s eyes—and therefore does not cover all of the conditions of blind and

⁶⁶ Kevin Garnett, ‘The Copyright (Visually Impaired Persons) Act 2002’ (2003) EIPR 522, 523.

⁶⁷ *ibid.*

visually impaired persons. The legislation does not protect people with cognitive or perceptual problems, who, like other blind or visually impaired persons, are also regarded by the RNIB as reading-impaired.⁶⁸

Comparing the definition of visually impaired persons in the Marrakesh Treaty with that in UK legislation, the former is broader and more complete in describing people who may be unable to read. The CDPA could not be implemented in certain situations that people will encounter relating to copyright exception, and may therefore be incompatible with access for visually impaired persons. The CDPA therefore needs to adopt the definition in the Marrakesh Treaty and extend the limitation to all beneficiary persons needing protection.

3.2.2 National law in the United States

Until recently, there was no legislation specifically covering visually impaired people in the United States. Instead, legislation was enacted for all disabled people. The definition of visually impaired persons in Section 121 (d) (2) of the US Copyright Act states that:

‘blind or other persons with disabilities’ means individuals who are eligible or who may qualify—in accordance with the Act entitled ‘An Act to provide books for the adult blind’, approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487)—to receive books and other publications produced in specialized formats’.

However, the Marrakesh Treaty Implementation Act was introduced in the Senate in March 2018. To ensure complete coverage of beneficiaries, the Act

⁶⁸ Bradshaw (n 51) 354.

establishes that the persons the authorised entity serves are called ‘eligible persons’.

An eligible person is defined as someone who:

(a) is blind; (b) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.

The definition of ‘eligible persons’ is consistent with the Marrakesh Treaty’s definition of ‘beneficiary persons’.⁶⁹

3.2.3 National law in Taiwan

There is no limitation on the type of person to whom Article 53 (1) of the Copyright Act applies. Anyone can reproduce material using Braille, sound-recording, digital transformation, verbal imagery, accompanying sign language or otherwise.

3.3 The definition of accessible format copies and methods of access in the Marrakesh Treaty

Because beneficiary persons are entitled to use accessible format copies, the definition of accessible formats needs to identify the different types of copyright works. How we define accessible format copies and methods of access will affect whether items have legal protection.

⁶⁹ USPTO, ‘The “Marrakesh Treaty Implementation Act of 2016” Statement of Purpose and Need and Sectional Analysis’ <
https://www.uspto.gov/sites/default/files/documents/MarrakeshTreaty-SOPAN_0.docx> accessed 16 May 2018.

Accessible formats for visually impaired persons may include large print publications, audio recordings, and photographic enlargements. The development of technology has also led to a number of new format types, such as electronic Braille and digital copies that are compatible with screen-reading software. One of the most important formats is Accessible Information System (DAISY).⁷⁰

The main difference between visually impaired persons and other people who benefit from an exception is in the different accessible format copies and methods of access which they adopt. This section therefore focuses on accessible format copies and methods of access.

Article 2 of the Marrakesh Treaty defines an ‘accessible format copy’ as:

A copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons, and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

It also defines ‘work’ as ‘literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media’.

⁷⁰ Sullivan (n 7) 12.

According to the treaty, an accessible format copy should only be used by beneficiary persons, and should retain the integrity of the original work. In other words, such works should be obtained legally, transferred to an accessible format copy, and provided exclusively to visually impaired persons.⁷¹

Under Article 4(2) of the Marrakesh Treaty,⁷² there are two types of accessible format: the first is one made by authorised entities, and the second is one made by a beneficiary person, or someone acting on their behalf, for their private use.

Article 4(2)(a) describes authorised entities and the four conditions they need to meet: authorised entities should have lawful access to the copyright works; they may adopt any means needed to navigate information in the accessible format, but not introduce changes other than those needed to make the work accessible to the beneficiary person; the accessible format copies are for use by beneficiary persons only; and the activity must be undertaken on a non-profit basis.

These conditions imply that the change to accessible format copies should not affect the copyright holders' commercial profits, because authorised entities should obtain lawful access in advance, and it does not profit them to make more

⁷¹ 'Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons' (n 60).

⁷² Article 4(2) of the WIPO Marrakesh Treaty states that 'A Contracting Party may fulfil Article 4(1) for all rights identified therein by providing a limitation or exception in its national copyright law such that: (a) Authorized entities shall be permitted, without the authorization of the copyright rights-holder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives...; and (b) a beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or may otherwise assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.'

copies than are needed by the beneficiary persons. Therefore, the conditions should protect both public and private interests.

The WBU considered that this Article might allow authorised entities to make accessible copies of works without obtaining permission from copyright holders. However, this is addressed by one of the exceptions to copyright law for print-disabled people which EU Member States have enacted under the terms of the EU Copyright Directive.⁷³

According to Article 4(4), members may decide on exceptions or limitations that only apply to published works in applicable special formats which cannot be otherwise obtained within a reasonable time and at a reasonable price. Finally, whether compensation should be paid for exercising exceptions or limitations under this Article may also be defined in national law.

From the copyright holders' point of view, checking in advance if particular works are already commercially available—i.e. on the local market, in an acceptable state, with an established remuneration scheme—could avoid affecting the copyright holders' profits.⁷⁴ Although the Marrakesh Treaty is not intended to facilitate the introduction of commercial availability tests and remuneration schemes into Member States' law, there is a requirement to check if an accessible work is available on the market—i.e. conduct a commercial availability test—before allowing an exception under Article 4(4).

Compared to other institutions, public libraries have rich experience in serving visually impaired people, resources and places for producing, distributing

⁷³ World Blind Union Asia Pacific, 'The Treaty of Marrakesh explained by WBU' 23 August 2013 <<http://wbup.org/index/archives/695>> accessed 6 August 2017.

⁷⁴ Harpur (n 23) 72-73.

and exchanging works in barrier-free formats across borders, and human, financial and material resources for disseminating works in barrier-free formats. However, it would be difficult, and in many cases impossible, for libraries to ascertain with certainty if a work is available in a particular accessible format. Many libraries do not have the resources to undertake such checks, and the library might decide to opt out of providing the service because of the high legal risk. Therefore, in order to facilitate the accessibility of works in barrier-free format, public libraries must confirm their legal status, rights, responsibilities and obligations at the legal level. Also, a remuneration scheme to allow an exception under Article 4(5) would represent double payment for use of the work, because it would already have been purchased or licensed legally. The accessible format copy is made for the sole purpose of providing equal access to the work, and the activity is undertaken on a non-profit basis. The introduction of a remuneration scheme would impose more costs on libraries.

The introduction of a commercial availability test and remuneration scheme would not therefore meet the Marrakesh Treaty objective to end the book famine.⁷⁵ For this reason, Article 22 of the treaty states: ‘It is understood that a commercial availability requirement does not prejudice whether or not a limitation or exception under this Article is consistent with the Three-Step Test.’

3.4 Definitions of accessible format copies and methods of access in national legislation

In national legislation, copyright exceptions may relate to many issues, including news reporting, scientific research, educational establishments, people with disability,

⁷⁵ EIFL, ‘Implementation of the Marrakesh Treaty for Persons with Print Disabilities Frequently Asked Questions (FAQs)’ 2016
<http://www.eifl.net/system/files/resources/201701/eifl_marrakech_faqs_0.pdf> accessed 6 August 2017.

and others.⁷⁶ When assessing national legislation relating to copyright exceptions, there are three main issues to consider: ‘the type of copyright work that may be used’; ‘whether or not the work must have already been published’; and ‘whether or not activity can take place under the exception for a work that is already available in an accessible format’.⁷⁷

Different types of accessible format are permitted in different countries, and can be divided into the following types: (1) exceptions not limiting the type of accessible format; (2) exceptions permitting Braille and other special formats; and (3) exceptions specifying other types of provision in accessible formats.⁷⁸

A version of a work that provides improved access is an accessible copy. There are different formats for copying, which include making an enlarged photocopy, a version of a work in Braille, or in the form of an audio book, and so on.⁷⁹

3.4.1 National law in the United Kingdom

The Marrakesh Treaty adopts a flexible approach to defining accessible formats. The UK lists some examples of accessible formats but does not limit the scope to those formats alone.

There are two exceptions in the Copyright (Visually Impaired Persons) Act 2002: Section 31A, which enables the making of a single accessible copy for personal use; and Section 31B, which enables multiple copies for visually impaired persons. Sections 31A and 31B do not apply: (a) if the master copy is of a musical

⁷⁶ Patricia Akester, ‘The New Challenges of Striking the Right Balance between Copyright Protection and Access to Knowledge, Information and Culture’ (2010) 32 EIPR 372, 373.

⁷⁷ Sullivan (n 7) 12.

⁷⁸ *ibid.*

⁷⁹ Garnett (n 66).

work, or part of a musical work, or if the making of an accessible copy involves recording a performance or part of it; or (b) if the master copy is of a database, or part of a database, and the making of the accessible copy infringes copyright in the database. Besides this, if copies of the copyright work are commercially available by or with the authority of the copyright owner, then not only Section 31A but also Section 31B will apply to such situations. In addition, regulation concerning holding intermediate copies is enacted in Section 31C.

The ‘one for one’ exception (Section 31A) means that a visually impaired person can make or ask anyone to make him or her a single accessible copy of a copyright work for his or her own private use under certain conditions. However, visually impaired persons cannot keep the accessible copy if they do not need to access it. Section 31A is different from other exceptions, as visually impaired persons are able to copy the whole of the work, and the work can either be published or unpublished. In other words, it can be applied to archival collections and libraries.

On the other hand, the ‘multiple copy’ exception (Section 31B) permits non-profit organisations to make multiple accessible copies of a copyright work and provide them to visually impaired persons for their personal use under certain conditions. The copyright owner must be informed within a reasonable time of the making of these accessible copies. After establishing, with the copyright owners, a licensing scheme permitted by the exception, and notifying the Department for Innovation, Universities and Skills about the licensing scheme, licences under that scheme must be taken out. An accessible copy can take any form for a visually

impaired person, but if the copy is in electronic form the making and using must fall within the scope of the exceptions.⁸⁰

However, in the new legislation, it does not state how non-profit organisations are able to discover whether specific accessible copies are commercially available already, or how non-profit organisations can prove that they have taken sufficient steps to make sure there are no such accessible copies on the market. These problems can lead to the burden of costs falling on such organisations, since they are required to make these investigations.⁸¹

Making multiple copies by an approved organisation under Section 31B may involve making intermediate copies during the manufacturing process. However, if there were no exception for such copying it would infringe copyright. Therefore, under Section 31C, an approved body is entitled to make accessible copies under Section 31B and may hold an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but only (a) if and so long as the approved body continues to be entitled to make accessible copies of that master copy; and (b) for the purposes of the production of further accessible copies. An intermediate copy is a copy made from the master copy, is subsequently used to make multiple copies, and is needed as part of the manufacturing process.⁸²

The new Section 31D(1) is restricted to the ‘making’, but not the ‘supplying’, of accessible copies under Section 31B, stating that:

(1) Section 31B does not apply to the making of an accessible copy in a particular form if—(a) a licensing scheme operated by a licensing body is in

⁸⁰ Paul Pedley, *Digital Copyright* (Facet Publishing 2007) 80.

⁸¹ Bradshaw (n 51) 355.

⁸² Garnett (n 66) 526.

force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form....

One of issues that the new Section 31D(1)(a) addresses is the position where a licensing scheme is in existence for the making of accessible copies. As far as this Section is concerned, this scenario currently relates to the scheme established by the Copyright Licensing Agency (CLA) for licensing not-for-profit organisations to make multiple accessible copies of certain works for visually impaired persons. The licence only covers not-for-profit organisations making accessible copies of ‘works’, which the definition limits to ‘original literary or artistic work’. Therefore, the CLA licensing scheme does not normally include dramatic and musical works.

It appears to the writer that this issue is not expressly provided for anywhere in the new Section 31D of the CDPA 1988. However, it will only be confirmed as correct or otherwise if the relevant litigation adopts the restriction imposed by Section 31D(1)(a). Consequently, under the CLA licensing scheme—which purportedly only applies to accessible copies made of literary and/or artistic works—the Section 31B exception will still be applicable for the making of accessible copies of dramatic and/or musical works.⁸³ There were no specific formats specified in the CDPA, therefore any new methods of access will also have to conform. However, this is only allowed for non-profit purposes.⁸⁴

Although the legislation protects exceptions relating to different accessible formats and methods of access for visually impaired persons, in the UK those exceptions may in practice be overridden. For example, rightholders may draw up a

⁸³ Bradshaw (n 51) 351-52.

⁸⁴ David Gee, ‘Should Librarians and Information Professionals be Content with Current UK Copyright Law?’ (2008) LIM 204, 207.

licensing scheme—covering the same activity that would be permitted under the relevant exception—and seek payment in accordance with the licensing scheme.⁸⁵

The UK signed the Marrakesh Treaty at the Conference on 28 June. The current UK exceptions are limited to situations where the appropriate accessible format work is not available commercially on the domestic market. Article 4(4) of the Marrakesh Treaty provides for contracting parties to limit application of the exception to works which cannot be obtained commercially under reasonable terms. However, when any Contracting Party avails itself of this limitation, it must notify WIPO. Implementation of the Marrakesh Treaty may also require amendments to the CDPA in relation to provisions covering the import and export of accessible works under the exception. This would help solve the issue of cross-border exchange of works.⁸⁶

3.4.2 National law in the United States

Section 121 (a) of the US Copyright Act states that:

(a) Notwithstanding the provisions of Section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

Section 121 (d) (4) states that:

⁸⁵ Sullivan (n 7) 12.

⁸⁶ House of Commons, ‘5 Access to published works for the visually impaired’ 26 March 2014 <www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxxix/8308.htm> accessed 6 August 2017.

specialized formats means – (A) Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and (B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

Section 121 of the US Copyright Act allows entities to provide copies or recordings of previously published, nondramatic literary works in specialised formats for blind or other persons with disabilities. The Act does not provide remuneration for right holders, but it needs to obtain certification before works are made available⁸⁷.

Section 121(a) of the Copyright Act is expressly limited to literary works that are nondramatic, and is silent with respect to related illustrations and musical works. The Marrakesh Treaty's scope includes dramatic works in the form of text, such as the script of a play, as well as musical works in the form of text and notation, such as sheet music. To ensure complete coverage of the works addressed by the treaty, the Marrakesh Treaty Implementation Act broadens the categories of works.⁸⁸

3.4.3 National law in Taiwan

In order to implement the Marrakesh Treaty, Article 53 of the Copyright Act, modified on 22 January 2014, states that:

(1) For the purpose of exclusive use by the visually impaired, learning disabled, hearing impaired or other persons with a perceptual disability, works that have been publicly released may be exploited by local or central

⁸⁷ Best Practices <http://www.visionip.org/vip_resources/en/best_practices/us.html> accessed 14 November 2011.

⁸⁸ USPTO (n 69).

government agencies, non-profit organisations and all levels of legally established schools, by means of translation, Braille, sound-recording, digital transformation, verbal imagery, accompanying sign language or otherwise.

(2) The preceding paragraph shall be applied *mutatis mutandis* to the disabled persons or their guardians referred to in the preceding paragraph for personal and nonprofit use by the disabled.

(3) The copies reproduced in accordance with the preceding two paragraphs may be distributed or publicly transmitted among the disabled persons, local or central government agencies, non-profit organisations and all levels of legally established schools as prescribed in the preceding two paragraphs.

Article 53 of the Copyright Act protects access rights not only for visually impaired persons but also for those who are physically and mentally disabled. Accessible formats and methods are not limited, and Article 53(3) allows copies to be distributed or publicly transmitted to disabled persons and other entities. This should help to assure access rights for disabled persons and provide more opportunities for accessing works.

In order to implement Article 53, Article 80-2 states that TPMs cannot block access rights for visually impaired persons. Moreover, Article 87-1 (1) allows local or central government agencies, non-profit organisations and all levels of legally established schools to import copies—reproduced by means of translation, Braille, sound-recording, digital transformation, verbal imagery, accompanying sign language or otherwise—provided such copies are used in compliance with the

provisions of Articles 53. It will therefore be easier for visually impaired persons to access works from other countries.

In Taiwan, the Copyright Act appears to provide enough protection for visually impaired persons—because of the scope of protection and implementation methods adopted—however compensation is not addressed. This may deter rightholders from exercising their rights, and cause an imbalance between the protection of users and the protection of rightholders. The government of Taiwan should therefore continue to address the implementation of the international treaty, especially on the issue of compensation schemes.

3.5 Conclusion

The definition of beneficiaries, accessible formats, and access methods determines who has access to copyright works and how they are accessed. There are also different ways to define the beneficiaries of copyright exceptions, depending on the definition of visually impaired persons. Although the UK lists four types of visually impaired person, the term ‘normally’ is debatable—because the scope of the end beneficiary is uncertain and needs to be determined judicially—therefore beneficiary persons may risk copyright infringement.⁸⁹ In order to protect the rights of disabled people to access works, legislation needs to extend the scope of beneficiaries and be more explicit.

There are various methods for identifying beneficiary persons. A functional definition of beneficiaries is probably most suitable—for example, using a

⁸⁹ Sullivan (n 7) 31.

comparative test to determine whether it is reasonable for a person to access a work in a normal environment.⁹⁰

In copyright legislation exceptions, the term ‘reading-disabled’ person is also more suitable than ‘visually impaired’ person. Reading-disabled person could include people without sight; people with severely impaired sight; people unable to hold or manipulate books or focus or move their eyes; and even people with perceptual or cognitive disabilities that prevent them from reading standard print. It should be noted that if a person with a perceptual or cognitive disability can read standard print, they should not be regarded as reading-disabled. Therefore, not all disabled people should be deemed to be reading-disabled.⁹¹

On the other hand, permitting translations and other formats of works, in appropriate circumstances—rather than specifying particular formats—would be more helpful to end beneficiaries.⁹² The flexible definition of accessible formats in the Marrakesh Treaty will avoid issues if new technology leads to the development of new formats. Therefore, members should ensure that limitations and exceptions could include all literary, artistic and scientific works expressed through text and related illustrations.⁹³ Although the UK does not limit the types of accessible formats, there are limitations to control access, such as the licensing scheme. UK legislation is more consistent with the new treaty, which does not limit the formats of works, but uses licences to control access rights.

⁹⁰ *ibid.*

⁹¹ ‘Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons’ (n 60).

⁹² Sullivan (n 7) 12.

⁹³ EIFL, ‘The Marrakesh Treaty: An EIFL Guide for Libraries’ December 2014 <http://www.eifl.net/sites/default/files/eifl-guide-marrakesh_en_1.pdf> accessed 6 August 2017.

Article 4(1) of the Marrakesh Treaty requires countries to provide in their national law an exception to the right of reproduction, distribution, and making available to the public, “to facilitate the availability of works in accessible format copies for beneficiary persons.” Countries have significant flexibility in how they can meet the obligation in Article 4(1). One way is set out in Article 4(2), whereby an authorised entity would be permitted to make an accessible format copy, or to obtain an accessible format copy from another authorised entity, and to supply the copy directly to visually impaired persons. The other way is set out in Article 4(3), whereby a country can also fulfil Article 4(1) by providing other limitations or exceptions in national copyright law. In contrast to Article 4(1), which is mandatory, Articles 4(4) and 4(5) are optional articles that, if implemented into national law, would restrict the freedoms allowed under the treaty.⁹⁴

The objective of exceptions is to restrict the rights of copyright holders and to protect access to information. Therefore, copies should be made on a non-profit basis, in order to avoid infringing the original rights of copyright holders. However, the greater the protection provided to visually impaired persons, the lower the protection of copyright holders’ interests. The ultimate goal of copyright restriction system lies in the balance of interests, which is based on the coordination of the conflict of interests between knowledge copyright holder and the public. It should therefore strive to provide better legislation and treaties which open up available access methods, and make copyright works available to visually impaired persons, while also addressing the interests of copyright holders. Achieving a balance between users and copyright holders is essential for the success of copyright legislation—and indeed for the spread of culture.

⁹⁴ *ibid.*

Libraries are key to the success of the Marrakesh Treaty. They have a long history of service to visually impaired persons, and only blind people's organisations, libraries and other so-called "authorised entities" can send accessible format copies to other countries. Because the treaty provides countries with important policy options, librarians need to be involved in the development of implementing national legislation, to ensure the maximum possible benefit, and to effectively meet the goal of the treaty.⁹⁵ The Marrakesh Treaty's broader definition of beneficiaries and access methods should provide greater access for visually impaired persons. In addition, the treaty should help to harmonise the various limitations and exceptions across different countries.

⁹⁵ *ibid.*

Chapter 4 Cross-border licensing of works

Following discussion of a definition of beneficiary persons, and of accessible formats and methods, another important issue which needs to be considered is the distribution of copyright works. Although distribution rights may grant copyright holders the exclusive right to make a work available to the public, the main issue for the protection of access rights for beneficiary persons is how to readjust the distribution right of copyright holders, especially when cross-border licensing is involved. Therefore, the WIPO Marrakesh Treaty establishes an import/export regime for the exchange of accessible books across borders⁹⁶.

Copyright holders have various kinds of rights in their works, such as rights of reproduction and distribution. However, in the digital age these rights have been affected in certain respects, such as in methods of distribution which have changed with digital technology. It means that users can now access or copy any digital works, irrespective of international borders, and more easily than before. It also means, however, that users may risk copyright infringement. Therefore, the adequacy and scope of copyright exceptions—relating to accessible format copies and methods of access—also need to be assured. In addition, access methods and licensing schemes need to be reviewed in light of technological changes and advances. Moreover, when dealing with the licensing of copyright works for visually impaired persons, it may be necessary to consider the issue of distribution and importation rights.

This chapter discusses the rights of copyright holders, and focuses on distribution and importation. It also looks at how the exhaustion doctrine is regulated in international conventions and treaties. Finally, it describes how key issues in the Marrakesh Treaty include preventing the reproduction and distribution of

⁹⁶ World Blind Union, 'The Treaty of Marrakesh Explained' (n 35).

unauthorised copies, and preventing copyright infringement when people import or export accessible works.

4.1 Distribution rights and licensing

Licences are granted by copyright holders to allow the use of copyright works. Once someone has obtained the copyright holder's permission, they may use the work in a specified way, for a limited period of time, without risk of infringing copyright⁹⁷. Copyright licences would be preferable for copyright holders, because they could be used to control the exploitation or distribution of works, even across borders. However, getting permission from each copyright holder is quite difficult for libraries or visually impaired persons, because licensing agreements may contain many specific conditions, covering such issues as methods of distribution or regional restrictions. Therefore, compulsory licensing needs to be considered, in order to promote access to works for visually impaired persons, and address certain issues related to exceptions, such as the systems for obtaining permission from copyright holders being dependant on the system of remuneration.⁹⁸ However, the use of compulsory licences may itself result in irreconcilable conflicts with the exhaustion doctrine—as well as adversely affecting the rights of copyright holders—if copyright holders are no longer able to decide how their works are used.

Article 4 of the Marrakesh Treaty creates an exception that allows organisations to produce, distribute, and make available accessible format copies for visually impaired persons, without the authorisation of copyright holders. However, the exception needs to meet certain specific conditions. For example, Article 2 of the Marrakesh Treaty requires authorised entities to discourage the reproduction and

⁹⁷ Intellectual Property Office, 'Copyright Essential Reading' <www.ipso.gov.uk/c-essential.pdf> accessed 19 August 2014.

⁹⁸ Sullivan (n 7) 377-78.

distribution of unauthorised copies, and take “due care” when dealing with works. Article 4(2) should help to increase the number of opportunities for visually impaired persons to access works, and avoid the process of compromising settlement. In addition, it specifies certain conditions which should protect the interests of copyright holders.

The Marrakesh Treaty provides exceptions to the right of reproduction, the right of distribution, and the right of making available, in order to facilitate access to books for visually impaired and print-disabled persons. Such exceptions are significant, because if the number of titles available in accessible formats is increased, then duplication of effort may be avoided, and greater numbers of works can be distributed more efficiently.

4.2 Importation rights and the exhaustion of rights

Although organisations could make works available without the permission of copyright holders, exchanging such works in an efficient way, and ensuring the rights of both copyright holders and visually impaired persons, would still pose complex problems. The key issue is how different libraries, under their respective national laws, share the production of accessible versions. A copy of a work may be made under a permitted exception of copyright in one country—for example the country of origin—however, if a copy is illegally made for visually impaired persons in another country, it would be wrong to assume that distributing such copies would be regarded as legal.⁹⁹ The issue of international copyright exception may be relevant to libraries and service organisations that exchange works—which they have

⁹⁹ *ibid.*

produced—across national borders. Therefore, the Marrakesh Treaty is needed to address this cross-border issue.¹⁰⁰

Another issue, related to importation rights, is that of parallel importation. Lack of parallel importation in some countries can result in a situation in which visually impaired persons are forced to rely on an international treaty,¹⁰¹ because there is such demand for content—from visually impaired persons—that a secondary market develops. However, parallel importation can also be a form of price arbitrage, if a market exists in the first place. For instance, a legitimate product is imported from one market—intended by the copyright holder—to another, unintended market, where it can be sold at a higher price.¹⁰²

The exhaustion doctrine concerns the limitation of copyright holders' distribution and importation rights. The exhaustion doctrine extinguishes a copyright holder's control over a work—based on what purchasers or owners might later do with the work—once the copyright holder has benefited from the initial copy. In other words, once a copyright holder has made the first sale, then the rights belonging to the copyright holder—that are embodied in the work—are exhausted, because it would be unfair to users if copyright holders could obtain additional compensation, and deprive purchasers of the rights to assign their property.¹⁰³ However, how rights are to be exhausted is a complex problem for different countries and regions.

¹⁰⁰ George Kerscher, Secretary General, DAISY Consortium, 'Copyright Exception and Trusted Intermediaries: Two Concepts that Work Together' 27 May 2009

<www.visionip.org/stakeholders/en/intermediaries_copyright.html> accessed 12 November 2011.

¹⁰¹ Pranesh Prakash, 'Exhaustion: Imports, Exports, and the Doctrine of First Sale in Indian Copyright Law' (2012) 5 NUJS L. Rev., 636, 657.

¹⁰² Rajnish Kumar Rai, 'Should the WTO Harmonize Parallel Import Laws? An Analysis of Exhaustion Doctrine' (2011) 6 JIPLP 898, 898.

¹⁰³ Yuan-Chen (Jessica) Chiang, 'Parallel Importation of Copyright Products in Taiwan: A Struggle with International Trade Policy' (2010) 13 J World IP, 744, 748.

Addressing these issues, Article 5.5 of the Marrakesh Treaty clearly states:

‘Nothing in this Treaty shall be used to address the issue of exhaustion of rights.’

Article 5.5 indicates that it could be to the advantage of visually impaired persons to pursue the principle of international exhaustion. This would mean that rights were exhausted once a work had been sold by the copyright holder—either directly, or with his or her consent—in any country. In other words, libraries could share accessible formats that were legally available in any country.

4.2.1 The case of *Kirtsaeng v. John Wiley & Sons, Inc*¹⁰⁴

While Supap Kirtsaeng was in the United States, he asked friends and family in Thailand to buy the English-language versions of his textbooks and send these textbooks to him. Kirtsaeng would then sell the textbooks in the United States and earn interests. In 2008, Wiley sued Kirtsaeng for copyright infringement. In 2013, the US Supreme Court reversed the Second Circuit and held that Kirtsaeng’s sale was protected by the first-sale doctrine. From the opinion of the US Supreme Court, firstly, the language of the section 109 of the Copyright Act says nothing about geography. The word “lawfully made under this title” means made “in accordance” with or “in compliance with” the Copyright Act. Secondly, both historical and contemporary statutory context indicate that Congress, when writing the present of the section 109(a), did not have geography in mind. Thirdly, a relevant canon of statutory interpretation favors a non geographical reading. The common-law makes no geographical distinctions. Finally, associations of libraries, used-book dealers, technology companies, consumer-good retailers, and museums point to vary ways in

¹⁰⁴ 133 S.Ct. 1351 (2013) (Sup Ct (US)).

which a geographical interpretation would fail to further basic constitutional copyright objectives, in particular “promoting the Progress of Science and useful Arts.” The US Supreme Court considered that any of geographical interpretations of the section 109(a)’s “first sale” doctrine would not apply to the Wiley Asia books. The “first sale” doctrine favors a non-geographical interpretation. Moreover, if we adopt the geographical interpretation, it may threaten ordinary scholarly, artistic, commercial, and consumer activities. The Court held that the first-sale doctrine applies to goods manufactured outside of the United States and that “lawfully made under this title” is not limited by geography. The Court held that even if the copyright owner does not authorize its importation into the United States, the copyright owners’ right to restrict subsequent distribution of a work ends after the first sale of the work that is lawfully made abroad.¹⁰⁵

From the above case, it is evident that importation and exhaustion issues affect the access rights of beneficiaries, and should be emphasised, especially in the online environment. The transmission of digital works are protected by the distribution rights in the United States and there is one more way to protect the digital contents by the “offer to the public” in the EU. However, the licensing acts never satisfy the requirement of the first marketing defined under the exhaustion doctrine due to the characteristic of the digital works may be considered copyright licensing acts other than the sale. The exhaustion doctrine would not apply to digital contents. Moreover, for many years, libraries have relied on the first-sale doctrine. If we accept that “lawfully made under this title” is limited by geography, it would be unduly burdensome for libraries to obtain copyright holders’ permissions. The concept of national exhaustion does not allow copyright holders to control the

¹⁰⁵ Suzanna M.M. Morales, 'United States Supreme Court decision in *Kirtsaeng v John Wiley & Sons Inc*' (2013) E.I.P.R. 2013, 35(12), 773, 773.

commercial exploitation of works which they put on the domestic market. However, copyright holders could still oppose the importation of original works marketed abroad, based on the right of importation. In the case of regional exhaustion, the first sale of works by copyright holders exhausts any rights over those works, not only domestically, but within the whole region. Where a country applies the concept of international exhaustion, the rights are exhausted once the work has been sold by the copyright holders in any part of the world.¹⁰⁶

The choice of exhaustion type—national, regional or international—may reflect a country’s role as a leader or follower in technological development. The mechanism through which exhaustion works is the same as that for intellectual property rights. Strong intellectual property rights allow the rightholder to affect the market through an economically desirable business plan supported by licensing and other contractual mechanisms. The exhaustion doctrine allows non-owners to use the protected work to pursue their own economic plans.¹⁰⁷

4.3 International conventions and treaties, and the exhaustion of rights

There are several existing international conventions and treaties which concern the exhaustion of rights. However, they adopt different standpoints based on various considerations.

4.3.1 The Berne Convention

Article 14(1) of the Berne Convention states that:

¹⁰⁶ World Intellectual Property Organization, ‘International Exhaustion and Parallel Importation’ <http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm> accessed 6 January 2018.

¹⁰⁷ Shubha Ghosh, ‘The Implementation of Exhaustion Policies’ November 2013 <<https://www.ictsd.org/downloads/2014/01/the-implementation-of-exhaustion-policies.pdf>> accessed 6 August 2017.

(1) Authors of literary or artistic works shall have the exclusive right of authorizing: (i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced; (ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

Distribution is related to reproduction, therefore any limitations on exceptions to reproduction rights may imply that those limitations also apply to distribution rights.¹⁰⁸ However, on the question of importation rights, the Berne Convention does not provide any guidance.

4.3.2 Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Article 6 of TRIPS states that:

‘For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.’

Article 6 of TRIPS does not clearly identify any specific exhaustion regime; in other words, countries may choose international, regional or national exhaustion.¹⁰⁹ Allowing this level of choice can present visually impaired persons with obstacles and difficulties when accessing copyright works and addressing the issue of cross-border licensing.

¹⁰⁸ Sullivan (n 7) 87-88.

¹⁰⁹ Enrico Bonadio, ‘Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?’ (2011) 33 EIPR 153, 158.

4.3.3 The EU Copyright Directive

All Member States grant copyright holders exclusive rights under Articles 2 to 4 of the EU Copyright Directive. However, there are some fundamental differences, particularly with respect to the systematic category of rights, which may have certain disharmonising effects. This is particularly true of the distribution right and its exhaustion. In addition, differences are apparent in relation to the implementation of Article 3, concerning the right of communication to the public, while some minor variations also exist in regard to the scope of the reproduction right in Article 2.¹¹⁰

The EU Copyright Directive is intended to implement the WIPO Copyright Treaty (WCT). Article 4 states that:

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. 2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

This forces Member States to adopt ‘Community exhaustion’ and not international exhaustion. According to Article 4(2) of the Directive, there are two conditions for the exhaustion of distribution rights: one is that the first sale, or other transfer of ownership, should take place in the EC; and the other is that the sale

¹¹⁰ Queen Mary Intellectual Property Research Institute, ‘Part II – The Implementation of Directive 2001/29/EC in the Member States’, Page 1, February 2007<http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf> accessed 6 August 2017.

should be made with the permission of the copyright holder. Recital 28¹¹¹ also confirms the doctrine of Community exhaustion.¹¹²

The doctrine of Community exhaustion is inadequate for visually impaired persons, because it overprotects copyright holders' interests. However, further restrictions might be unhelpful to the interests of visually impaired persons.

In 2012 the Council authorised the Commission to participate, on behalf of the EU, in negotiations within the framework of the WIPO on the future Marrakesh Treaty. The Commission asked the European Court of Justice (ECJ) to give its opinion on whether the Marrakesh Treaty may be concluded by the EU acting on its own or whether the participation of the Member States is necessary for that purpose. The ECJ examined whether the Marrakesh Treaty is connected with the common commercial policy and concluded that the Marrakesh Treaty does not come within the ambit of the common commercial policy. First, the Marrakesh Treaty is not intended to promote, facilitate or govern international trade in accessible format copies. The aim of the treaty is to improve the position of beneficiary persons by facilitating, through various means, their access to published works. Secondly, the cross-border exchange of accessible format copies for which the Marrakesh Treaty provides cannot be equated with international trade engaged in by ordinary operators for commercial purposes. Such exchange takes place only between government

¹¹¹ Recital 28 of the EU Copyright Directive states that 'Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.'

¹¹² Silke Von Lewinski, 'International Exhaustion of the Distribution Right under EC Copyright Law?' (2005) 27 EIPR 233, 234.

institutions or non-profit organisations in accordance with the conditions specified in the treaty. Besides, the copies imported and exported are intended for beneficiary persons alone.¹¹³ In 2017, the European Parliament approved the Directive and the Regulation that implement the Marrakesh Treaty to facilitate access to published works for visually impaired persons. The Directive aims to establish rules on the use of certain works and other subject-matter without the authorisation of the rightholder, and to harmonise EU law applicable to copyright and related rights in the framework of the internal market for visually impaired people.¹¹⁴

The Directive does not permit Member States to apply commercial availability restrictions. The Directive provides for other market safeguards, including (1) the option to provide schemes to compensate for any harm the exception may cause to rightholders; (2) the requirement that domestic exceptions apply only in certain special cases which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interest of the right holder; and (3) an obligation on the European Commission to assess any negative impact the EU legislative acts have on commercial markets, 6 years after the date of entry into force.¹¹⁵ The use of such compensation schemes is limited by Recital 14 of the Directive.

Other issues covered by Recital 14 of the Directive include: the level of compensation on the non-profit activities of authorised entities; the public interest

¹¹³ Opinion Procedure 3/15. Opinion of the Court of 14 February 2017, 'EU may conclude Marrakesh Treaty without Member States' (2017) 353 EU Focus 26, 27.

¹¹⁴ European Parliament / Legislative Observatory, '2016/0278(COD) - 13/09/2017 Final act', 13 September 2017
<<http://www.europarl.europa.eu/oel/popups/summary.do?id=1503897&t=f&l=en>> accessed 6 May 2018.

¹¹⁵ Intellectual Property Office, 'Consultation on UK's Implementation of the Marrakesh Treaty', 8 May 2018
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705158/marrakesh-treaty.pdf> accessed 9 May 2018.

objectives pursued by the Directive; the interests of beneficiaries of the exception; the possible harm to rightholders; and the need to ensure cross-border dissemination of accessible format copies. For example, a French rightholder would not be able to claim compensation from a Belgian library if the library received an accessible format work from France.¹¹⁶ The lack of clarity around compensation schemes may excessively burden authorised entities and prevent those entities from obtaining accessible works. Recital 14 of the Directive does provide assessment methods for determining compensation plans, and these could help authorised entities to evaluate the cost of obtaining accessible works in advance and minimise compensation for rightholders.

The Regulation focuses on establishing uniform rules on cross-border exchange—between the Union and countries that are parties to the Marrakesh Treaty—of accessible format copies of certain works and other subject-matter, without the authorisation of the rightholder. Such exchange of copies in accessible formats applies to books (including e-books, journals, newspapers, magazines and other kinds of writing), notation (including sheet music), and other printed texts (including in an audio form, whether the format is digital or analogue).¹¹⁷

Recital 8 of the Regulation encourages Member States to implement initiatives to promote the treaty and the exchange of accessible format copies—such as guidelines or best practices on the making and dissemination of accessible format copies—in consultation with representatives of authorised entities, beneficiary

¹¹⁶ EBLIDA, ‘Implementing the Marrakesh Treaty in European Union Member States’, 1 October 2017
<http://www.eblida.org/Documents/Marrakesh%20Treaty/01_eu_marrakesh_transposition_guide.docx> accessed 11 May 2018.

¹¹⁷ European Parliament / Legislative Observatory, ‘2016/0279(COD) - 13/09/2017 Final act’, 13 September 2017
<<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1503893&t=f&l=en>> accessed 6 May 2018.

persons and rightholders.¹¹⁸ Processes for exchanging and managing resources need to be improved if the goal is to achieve better access rights for visually impaired persons. Capturing the opinions and experiences of different stakeholders—such as libraries, disabled people and rightholders—could also help in the design of a comprehensive system for achieving that goal.

Under the Directive and Regulation, authorised entities must be permitted to send accessible format copies to another country that is party to the treaty. Authorised entities may also send such copies either to another authorised entity, or directly to a beneficiary in the other country. Authorised entities therefore have a crucial role in the effective implementation of the international exchange of accessible format copies. Moreover, authorised entities are often active in the creation and distribution of accessible works within a country.¹¹⁹

With regard to implementing the EU Directive, exceptions should apply to both copyright and related rights. Libraries also need to be given explicit assurances that they can establish and follow their own practices for the provision of accessible format copies, as long as these are undertaken in good faith and are reasonable, based on local circumstances and conditions.¹²⁰

4.3.4 The Marrakesh Treaty and SCCR proposal compared

Article D¹²¹ of the SCCR proposal gives exporting countries the freedom to limit cross-border exchange of accessible format copies of a work if it is available in the

¹¹⁸ EBLIDA, ‘Implementing the Marrakesh Treaty in European Union Member States’ (n 116).

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ Article D states that: 1. Member States/Contracting Parties should/shall provide that if an accessible format copy of a work is made under an exception or limitation or export license in their national law, that accessible format copy may be distributed or made available to a beneficiary person in another Member State/Contracting Party by an authorized entity where that other Member State/Contracting Party would permit that beneficiary person to make or import that accessible copy. 2. A Member State/Contracting Party may fulfil Article D(1) by providing an

importing country. However, this freedom was curtailed in Article 5¹²² of the Marrakesh Treaty. Article 4 of the treaty agrees that countries need to have options for the commercial availability requirement in their national copyright law. However, apart from this, there is no “commercial availability” requirement for exporters of accessible books.¹²³

Article 5 is the effective heart of the Marrakesh Treaty and describes those features which are new to the international copyright system. The Marrakesh Treaty is the first WIPO treaty to provide rules for the cross-border supply of copyright-protected work.¹²⁴ Article 5 provides a flexible way to implement this obligation.

- Article 5(1) requires a country to permit an authorised entity to export an accessible format copy—made under an exception—to an authorised entity in another country, or directly to a beneficiary person in another country.
- Article 5(2) states that the domestic copyright law of the sending country must allow an authorised entity to distribute the accessible format copy to a beneficiary person, and to an authorised entity in another country, under the condition that the authorised entity did

exception or limitation in its national copyright law.... 3. A Member State/Contracting Party may fulfill Article D(1) by providing any other exception or limitation in its national copyright law that is limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

¹²² Article 5 of the WIPO Marrakesh Treaty states that: 1. Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party. 2. A Contracting Party may fulfil Article 5(1) by providing a limitation or exception in its national copyright law... 3. A Contracting Party may fulfil Article 5(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 5(4), 10 and 11.

¹²³ World Blind Union Asia Pacific (n 73).

¹²⁴ IPA, ‘IPA Guide to the Marrakesh Treaty’ 2016

<http://www.internationalpublishers.org/images/Accessibility/IPA_Guide_to_the_Marrakesh_Treaty.pdf> accessed 1 March 2017.

not know or have reasonable grounds to know that the accessible format copy would be used other than for beneficiary persons.

- Article 5(3) states that the authorised entity may decide whether “to apply further measures,” in its national copyright law pursuant to Articles 5(4), 10 and 11.¹²⁵
- Article 5(4)(a) states that a Contracting Party to the Marrakesh Treaty that has not ratified the Berne Convention, or is otherwise not bound to observe its provisions, may receive accessible format copies, but is prevented from exporting them to Marrakesh Treaty countries or to third party countries.
- Article 5(4)(b) states that an authorised entity—whether as a supplier or recipient of an export of an accessible format copy—may only supply an authorised entity or beneficiary persons in its own jurisdiction, unless the country is party to the WIPO Copyright Treaty or enacts co-extensive exclusive rights and protections as are provided for in the WIPO Copyright Treaty.¹²⁶

Article 6 of the Marrakesh Treaty contains a provision to match Article 5 and allow authorised entities or beneficiary persons to import accessible format copies from other contracting parties. Article E of the SCCR proposal also takes a similar position.

Because copyright law is ‘territorial’, exemptions usually do not include the import or export of works converted into accessible formats. Organisations must negotiate licences with copyright holders in order to exchange special formats across

¹²⁵ EIFL, ‘The Marrakesh Treaty: An EIFL Guide for Libraries’ (n 93).

¹²⁶ IPA (n 124).

borders in each country. This represents a huge economic burden on those countries.¹²⁷ The Marrakesh Treaty permits the cross-border exchange of accessible format books, both between authorised entities, and from one authorised entity to individuals in other countries. This also avoids duplication of transcription efforts in different countries, and allows the sharing of those collections of accessible books with visually impaired persons.¹²⁸ However, the precondition is that it should comply with the Three-Step Test.

Under Article 5 of the Marrakesh Treaty, authorised entities can distribute and make available accessible format copies to another authorised entity or directly to visually impaired persons in another country that is party to the treaty. However, it is important to note that the treaty does not set out particular procedures or systems to be followed that will typically reflect the social and economic circumstances around the world. Therefore, when the receiving authorised entity is located in a country that does not have obligations with regard to the Three-Step Test in international law, it must ensure that the accessible format copy is used only for the benefit of visually impaired persons within the country. As the treaty is without prejudice to other exceptions for persons with disabilities provided in national law, visually impaired persons shall not be prevented from cross-border sharing of works in the context of those other exceptions. Even if a country chooses to set a condition of non-commercial availability on the making and distribution of accessible formats, such a condition should not apply to accessible format copies made for cross-border

¹²⁷ WIPO, 'Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide' 27 June 2013 <www.wipo.int/pressroom/en/articles/2013/article_0017.html> accessed 6 March 2014.

¹²⁸ World Blind Union Asia Pacific (n 73).

use, as this would be very burdensome or even impossible for the originating authorised entity to check.¹²⁹

4.4 **Suggestions from libraries**

The number of visually impaired is very large. Their right to knowledge is not valued as it should be. In order to read works that normal people have access to, visually impaired people must convert such works into formats such as braille, large-type books and audiobooks. However, only a limited number of works are available for the visually impaired. This situation is prevalent in all countries of the world, both developing and developed. According to the world blind association, about one million books are published worldwide every year. Less than 5 percent of these books are converted to accessible formats. This is closely related to copyright protection. The library is the best place to reflect this problem. This severely restricts the freedom of visually impaired persons to seek, receive and transmit all kinds of information and ideas on an equal basis with others. This limits their access to education and research, as well as their ability to participate in socio-cultural life, enjoy the arts and share in scientific progress and its benefits. This thesis attempts to analyse the universal problems in the world through the questionnaire survey of Taiwan libraries.¹³⁰ In Taiwan, librarians described—via the research questionnaire¹³¹—a number of problems around sharing works for visually impaired persons. Such problems can lead to excessive burdens on libraries, and librarians therefore believe that legislators need to design a complete system of legislation and regulation, if access rights for visually impaired persons are to improve.

¹²⁹ EIFL, 'The Marrakesh Treaty: An EIFL Guide for Libraries' (n 93).

¹³⁰ Bonadio (n 109) 159.

¹³¹ Please refer to the Appendix 1 and Appendix 2.

By way of examples, first, and on a practical level, there is no standard guidance on how to share or exchange accessible works—for example, how to manage the deposit of electronic formats in archives. Second, if the application of the Three-Step Test is not reasonably clear, the risk of infringement may discourage libraries from obtaining accessible works.

Regarding the first issue, it may be necessary for countries to establish a legal deposit system. Under this system, copies of all new publications published in the country would be sent to an authorised agency, usually a library. The librarians suggested that rightholders should be encouraged to provide accessible formats for visually impaired persons. Rightholders normally have electronic versions of their works, therefore providing such files to the authorised agency would reduce the need to obtain rightholder authorisation, and avoid the risk of infringement.

However, the main issue may be that rightholders worry about losing control of their works—by “outflow”—and choose not to provide such files to a legal deposit system. In order to protect rightholders’ existing rights, any archive may therefore, initially at least, need to be based on deposits made in response to specific applications from visually impaired persons—with individual libraries ensuring that access to such works is restricted to visually impaired persons.

Regarding the second issue—the unpredictability of the Three-Step Test and the problem of fair use risking infringement—Article 53 of the Taiwanese Copyright Act protects access rights for visually impaired persons, and accessible formats and methods are not currently limited. However, amendments to Article 53 could raise doubts about copyright holders’ rights. The libraries suggest that consideration be given to a legal licensing system, including user charges. At the moment, the key

issue around access rights for visually impaired persons is that there are simply too few works for them to access—not that they do not want to pay for such works. If detailed user charging criteria were developed, it might encourage rightholders to provide their works.

However, the limitation of copyright alone is not enough to facilitate the accessibility of works in barrier-free format for the visually impaired, and the active intervention of non-profit intermediaries is also necessary to facilitate the accessibility of these works for the visually impaired. In addition, as a non-profit organisation, many authorised entities are worried about excessive obligation pressure caused by the relevant provisions of the treaty. Therefore, the obligations of authorised entities have been a concern of blind organisations, libraries and other sectors. As well as suggestions from the Taiwanese librarians, another approach could be to make greater use of the ABC Global Book Service, formerly known as Trusted Intermediary Global Accessible Resources (TIGAR). This is a global online catalogue of books in accessible formats that provides libraries serving visually impaired persons with the ability to search and make requests for accessible works. The ABC Global Book Service is an international library-to-library technical platform, by means of which libraries serving visually impaired persons can supplement their collections of accessible works with those from counterparts in other countries, free of charge.

As countries implement the Marrakesh Treaty in their national laws, the ABC Global Book Service can guide participating libraries through the process of exchanging accessible books. For example, the Marrakesh Treaty allows for the implementation of “commercial availability” provisions in national copyright legislation. In this case, the national law of a country may require that, before an

accessible book is exchanged across borders, the requesting organisation should confirm that the work is not commercially available on its market in the requested format. The ABC Global Book Service can advise participating libraries of such possible requirements under national copyright legislation, and make essential adjustments to the ABC Global Book Service platform to advise users to take this requirement into account.¹³²

Libraries have long proven themselves to be a balancing force for good. However, this is far from the case in every country. For example, Taiwan lacks international agreements on the utilisation of library resources. Although librarians suggest that the problems could be solved by establishing a legal deposit system and/or a legal licensing system, international collaboration still needs to be pursued.

The Marrakesh Treaty represents a significant development in international copyright law because it creates international minimum standards for the benefit of users of copyright-protected materials, and has the potential to greatly increase the availability of materials in accessible formats globally. However, bringing those benefits to people with print disabilities all around the world, in both developed and developing nations, still requires individual countries to bridge the gap.¹³³ It is estimated that the proportion of published books available in formats accessible to visually impaired persons is less than one percent in developing countries, compared to seven percent in developed countries.¹³⁴

¹³² WIPO, 'Report on the Accessible Books Consortium' 25 September 2017 <http://www.wipo.int/edocs/mdocs/govbody/en/mvt_a_2/mvt_a_2_inf_1_rev.pdf> accessed 16 June 2018.

¹³³ EIFL, 'The Marrakesh Treaty: An EIFL Guide for Libraries' (n 93).

¹³⁴ World Blind Union, 'Press Release WIPO Negotiations Treaty for Blind people', 20 April 2013 <<http://www.worldblindunion.org/english/news/pages/press-release-wipo-negotiations-treaty-for-blind-people.aspx>> accessed 6 June 2018.

Disparities in the quantity of accessible works available in developing and developed countries are also affected by differences in legislative systems and structures. For example, although the concept of exceptions has been in the laws of some countries for many years, the Marrakesh Treaty now includes a specific requirement on all members to allow cross-border exchange of materials. Because some countries' laws had certain exceptions but not always as wide as the treaty, the treaty will have the effect of standardising international provision in this area.¹³⁵

The International Federation of Library Associations and Institutions believes libraries need a full set of limitations and exceptions to copyright in all countries. This will empower libraries to continue to play their essential balancing role and enable cross-border flows of knowledge.¹³⁶ However, establishing worldwide systems will be difficult because every country has different standpoints and issues to consider. For example, it is in the interests of developed countries to grant and protect intellectual property rights and enact laws to enforce such rights. By contrast, developing countries oppose this, and seek to obtain more resources and assistance from developed countries. Economic factors could also delay the implementation of commercial availability, under the Marrakesh Treaty, since members may or may not choose to set commercial availability conditions—thus preventing the cross-border exchange of accessible works.

¹³⁵ William New, Intellectual Property Watch, 'WIPO Marrakesh Treaty in Force by Early 2016? Now Part of Bigger UN Process' 12 June 2015
<<http://www.ip-watch.org/2015/06/12/wipo-marrakesh-treaty-for-blind-readers-in-force-in-early-2016-now-part-of-bigger-un-process/>> accessed 16 June 2018.

¹³⁶ IFLA, 'ITEM 5 – General Statements' 4 October 2016
<https://www.ifla.org/files/assets/clm/statements/item_5_-_ifla_statement.pdf> accessed 26 June 2018.

4.5 Conclusion

The principle of exhaustion of rights is an important principle in intellectual property law. The copyright cannot lack the right exhaustion system, otherwise will lead to the copyright and the public for their own interests and serious conflict. The main problem with the use of the exhaustion principle is that its scope does not coincide with the scope of limitations and exceptions under the Marrakesh Treaty. For example, the exhaustion principle only addresses the right of distribution to the public—not the right to make available to the public, or public performance rights, both of which must be covered by limitations and exceptions. Also, the treaty's cross-border exchange provisions apply to the electronic exchange of both physical and digital copies. However, the exhaustion principle may not apply to all digital copies in all countries. The exhaustion principle is therefore less suitable as a treaty implementation tool.¹³⁷

The aim of the Marrakesh Treaty is to protect the interests and rights of both copyright holders and visually impaired persons. First, it permits authorities to make accessible works for visually impaired persons, under non-profit conditions, without the permission of copyright holders. Second, it permits the cross-border exchange of accessible format books—once again subject to compliance with the Three-Step Test.

Although, as described above, there are several exceptions or limitations for visually impaired persons—relating to the distribution, reproduction, and importation of copyright works—copyright holders can still manage and control their works using specific methods, such as TPMs or online licensing contracts. The Article 3 of the EU Directive and Regulation indicates that the exception cannot be overridden by

¹³⁷ Marketa Trimble, 'The Marrakesh Puzzle' 2014 < <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1923&context=facpub> > accessed 6 June 2018.

contracts. If visually impaired persons do not have access to appropriate technological equipment or related resources, they may still encounter obstacles and difficulties when accessing works. Also, there is no guidance on remuneration for copyright holders in the Marrakesh Treaty. Meanwhile, copyright holders doubtless complain about the adverse impact of cross-border exchange of accessible works, and would prefer not to give permission for it. Overall, therefore, the combination of technology development and cross-border licensing presents legislators in all countries with a difficult task.¹³⁸

¹³⁸ WIPO, 'Enabling Creativity in the Digital Environment: Copyright Documentation and Infrastructure' <www.wipo.int/meetings/en/2011/wipo_cr_doc_ge_11/index.html> accessed 15 November 2011.

Chapter 5 Digital rights management (DRM) and technological protection measures (TPMs)

Digital technology presents a number of challenges to copyright, and the access rights of visually impaired persons can be affected by technological developments. DRM systems may interfere with fair use of copyright works by visually impaired persons. Because legislation permits copyright holders to adopt TPMs, copyright holders are not only able to use such measures to protect their works, they can also control access to, and the copying of works, even when such works are not protected by copyright law—for example when copyright work enters the public domain. Moreover, even if users can circumvent TPMs, under the doctrine of fair use, copyright holders can still limit user behaviour improperly by imposing online licensing contracts.

In order to protect the access rights of visually impaired persons, Article 7 of the Marrakesh Treaty states that it should be legal to circumvent TPMs when accessing works. This chapter discusses the characteristics of DRM and TPMs, and how Article 7 of the Marrakesh Treaty can help to avoid unfair restrictions on access to works—for visually impaired persons—as a consequence of the lawful use of DRM or TPMs by copyright holders.

5.1 The problem of DRM misuse and fair access

In some cases, DRM may protect the rights of copyright holders by limiting accessibility for visually impaired persons. For example, DRM may restrict the copying, printing, and sharing of e-books. Legislation should therefore be concerned with the function of DRM systems, in order to avoid them having negative effects on visually impaired persons. Likewise, TPMs encompass many different technologies used to control access to copyright works. Because they encompass such varied and

complex technological functions, there is no agreed definition¹³⁹ of either DRM or TPMs.

However, when should the state need to intervene? Is it when an intended beneficiary of a privileged exception is faced with impossible use or access? The choice between allowing beneficiaries to benefit from an exception or limitation, and protecting the DRM rights of copyright holders, may present an irreconcilable dilemma.¹⁴⁰

Article 7 of the Marrakesh Treaty states:

Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.

Article 7 of the Marrakesh Treaty provides a broader exception, and attempts to constrain the improper use of TPMs. Visually impaired persons are granted greater opportunities to access works in digital formats, and are permitted fair access.

¹³⁹ Owing to the numerous and complex functions of DRM, only having a limited and uniform definition of DRM is inappropriate. Some scholars provide their own definitions of DRM, such as 'DRM is technical code, backed up by legal code, for the purposes of identifying, distributing and protecting digital content and which works by acting as a constraint against unauthorized uses of such content'. See Florian Koempel, 'Digital Rights Management' (2005) 11(8) CTLR 239, 239-240. See also Nick Scharf, 'Digital Rights Management and Fair Use' (2010) 1 EJLT, Internet, 1, 4.

¹⁴⁰ Patricia Akester, 'The Impact of Digital Rights Management on Freedom of Expression – The First Empirical Assessment' (2010) 41 IIC 31, 40, 57.

5.2 Legal protection of TPMs

TPMs include software and hardware devices or technology to protect copyright works from unauthorised or unlawful access. TPMs may be applied by rightholders or by authorised agents in the distribution process, and are used in conjunction with online accessible or downloadable copies of literary works in the form of copy control or access control, or a combination of these.¹⁴¹

The implementation of TPMs may restrict access to works for visually impaired persons. The legal protection guaranteed to TPMs appears to expand traditional copyright protection, because TPMs can be used to control access to works.¹⁴² Therefore, when a visually impaired person needs access, they may encounter obstacles if the works are protected by TPMs, and they run the risk of copyright infringement if legislation does not permit circumvention. Article 7 of the Marrakesh Treaty requires contracting parties to adopt schemes to circumvent prohibition and permit authorised entities to make accessible format copies. The agreed statement in Article 7 says:

It is understood that authorised entities, in various circumstances, choose to apply technological measures in the making, distribution and making available of accessible format copies and nothing herein disturbs such practices when in accordance with national law.

Article 7 ensures that TPMs—covering copy or access control, for example—cannot prevent visually impaired persons from enjoying the exceptions provided under the treaty, even when countries prohibit the circumvention of TPMs

¹⁴¹ IPA (n 124).

¹⁴² Marcella Favale, 'The Right of Access in Digital Copyright: Right of the Owner or Right of the User?' (2012) 15 JWIP 1, 1.

in their general copyright laws. Thus, countries must adopt mechanisms to permit authorised entities, such as exceptions to circumvention prohibition, or requiring rightholders to provide authorised entities with unlock methods.¹⁴³ The aim of Article 7, and of the agreed statement, is to help authorised entities make, distribute and provide accessible format copies more easily.

5.2.1 The circumvention of technological protection measures (TPMs)

Article 7 of the Marrakesh Treaty establishes that the exercise of privileged acts may not be hindered by technological protection measures (TPMs). This is implemented in two ways: first, authorised entities are given a right to circumvent any such copy protection; and second, they are given the right to claim from the right holder the issuance of an accessible version of the work.¹⁴⁴ Article 7 guarantees the proper enjoyment of the exceptions envisaged in Articles 4 to 6, by requiring states to ensure access by beneficiaries. Although the Marrakesh Treaty does not mention how this is to be achieved in practice, it does require states to take ‘appropriate measures, as necessary.’¹⁴⁵

The Marrakesh Treaty maintains a balance between the effective protection of the rights of authors and the wider public interest—particularly with regard to education, research and access to information—to facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities. However, if the law only permits circumvention of the TPMs, but does not permit the tools and services needed by authorised entities or visually impaired

¹⁴³ EIFL, ‘The Marrakesh Treaty: An EIFL Guide for Libraries’ (n 93).

¹⁴⁴ Reto M. Hilty, Kaya Koklu, Annette Kur, Sylvie Nerisson, Josef Drexler and Silke Von Lewinski, ‘Position Paper of the Max Planck Institute for Innovation and Competition Concerning the Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled’ (2015) 46(6) IIC 2015 707, 714.

¹⁴⁵ European Parliament, ‘The Marrakesh Treaty’ 2016
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571387/IPOL_STU\(2016\)571387_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571387/IPOL_STU(2016)571387_EN.pdf)> accessed 6 August 2017.

persons to undertake the circumvention, the statutory rules will have limited utility. Therefore, national law should also consider the tools and services that enable such circumvention, as appropriate.¹⁴⁶ Moreover, even if many countries allow exceptions for the benefit of visually impaired persons, they do not work smoothly in all cases—for example when copyright holders prevent accessible information being released to other countries.¹⁴⁷

The application of technology in the digital environment has affected both the number of accessible formats and the methods of access. For example, copyright holders may make use of TPMs to control the use of their works in the digital environment, thus potentially leading to an imbalance between the interests of copyright holders and users, because such controls may erode the rights users had in the traditional environment. Moreover, digital technology may also prevent visually impaired persons from taking advantage of exceptions. Such measures may conflict with public policy objectives if visually impaired persons could defend such copyright infringement under the fair use doctrine.

Apart from the Marrakesh Treaty, other WIPO treaties and national legislations also address the issue of circumventing TPMs. Article 11 of the World Copyright Treaty of 1996 states that:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in

¹⁴⁶ IFLA, ‘Implementing the Marrakesh Treaty in European Union Member States’ 1 October 2017 <http://www.eblida.org/Documents/Marrakesh%20Treaty/01_eu_marrakesh_transposition_guide.pdf> accessed 6 February 2018.

¹⁴⁷ Baker (n 8).

respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 11 of the WCT requires adequate legal protection and effective legal remedies against the circumvention of TPMs applied to protected works and phonograms.

As in the WCT, the issue of TPMs is also dealt with in Articles 6 and 7 of the EU Copyright Directive, which includes a model to balance the interests of rightholders and users by asking Member States to promote the use of voluntary measures to achieve the intended objectives, when implementing an exception or limitation for private copying in accordance with Article 5(2) (b). If such voluntary measures have not been taken to make reproduction for private use possible, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it.

Article 6(3) of the EU Copyright Directive defines TPMs as ‘any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts of circumvention’. Under Article 6(3), the application of TPMs is not explicitly defined; this may be because TPMs should protect against acts which are not authorised by rightholders, and are designed to prevent circumvention. The terminology does not specifically refer to the prevention of copyright infringement, and does not clarify the exact scope of rights regarding the interface between TPMs and copyright protection. Therefore, certain deviations could be seen to have an impact, not only on the definition of TPMs, but on the wider judicial treatment of circumvention prohibitions. In all Member States, TPMs may be applied to works and other subject-matter. Most Member States include the term ‘works and

other subject-matter’ in their definition, and indicate that a general prohibition against acts of circumvention is not applicable in cases where the information protected by a technological measure is not protected under copyright law.¹⁴⁸

Copyright holders have to take account of exceptions when they implement TPMs—in the wording of the Directive, copyright holders have to take ‘voluntary measures’ to implement these exceptions. If they fail to do so within a reasonable period of time, Member States must take ‘appropriate measures’.¹⁴⁹ However, a definition of the expression ‘appropriate measures’ needs to be introduced into Article 6(4) of the EU Copyright Directive, which states that such measures require the establishment of a procedure to facilitate expeditious access to works by beneficiaries of privileged exceptions, in order to confirm the purposes of the Directive and to facilitate standardised access to works across EC Member States. Beneficiaries—such as libraries, lecturers, students, and researchers—also require access to works protected by DRM in order to take advantage of certain copyright exceptions that are connected to core freedoms.¹⁵⁰ To address this problem, Article 6(4) should be amended to regulate how beneficiaries of privileged exceptions may benefit where those exceptions are not otherwise provided—for example, by providing a non-protected version of a work or a decryption key. In addition, the right to protection of privileged exceptions must take precedence over the right to

¹⁴⁸ Queen Mary Intellectual Property Research Institute (n 110) 51-52.

¹⁴⁹ Marcella Favale, ‘Approximation and DRM: Can Digital Locks Respect Copyright Exceptions?’ (2011) 19(4) IJL & IT 306, 310. See also Recital 51 of the EU Copyright Directive: ‘The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means....’

¹⁵⁰ Akester, ‘The Impact of Digital Rights Management on Freedom of Expression – The First Empirical Assessment’ (n 140) 46.

DRM protection, regardless of whether works are supplied online or not.¹⁵¹ Therefore, if contracting parties adopt schemes to combat circumvention prohibition—and permit authorised entities to make accessible format copies—this should help to achieve a balance between public and private interests.

The most commonly implemented exceptions in the EU Copyright Directive include personal copying, reproduction by libraries, teaching and research, disability, news reporting, and quotation/criticism. All of these are directly or indirectly concerned with the distribution of culture. These exceptions may be compulsory for all EU Member States, however they do not have any impact on TPMs.¹⁵² According to Article 6(4)¹⁵³ of the Directive, the mandatory list of exceptions concerning TPMs seems to be based on arbitrary criteria, rather than on technological factors or on the importance of the selected exceptions.¹⁵⁴ Article 6(4) creates an obligation to provide the means to exercise a limitation; this obligation is imposed on rights owners and does not give users any authority to perform acts of circumvention themselves. The implementation of Article 6(4) of the Directive at the national level has led to different interpretations of the persons who are entitled to claim the right to limitations, under the Directive, which has resulted in the following situations. In some Member States, only individual beneficiaries may claim the right to limitations, while in other countries interest groups and other third parties may

¹⁵¹ *ibid* 58.

¹⁵² Marcella Favale, 'Fine-tuning European Copyright Law to Strike a Balance between the Rights of Owners and Users' (2008) 33 *EL Rev* 687, 705.

¹⁵³ Article 6 (4) of the EU Copyright Directive states that 'Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.'

¹⁵⁴ Favale, 'Fine-tuning European Copyright Law to Strike a Balance between the Rights of Owners and Users' (n 152) 707-08.

also claim the right. Similarly, in some Member States, administrative bodies may be permitted to force rightholders to make necessary means available to beneficiaries of limitations.¹⁵⁵

5.2.2 Online contracts and the legal protection of technological measures over exceptions

Under the EU Copyright Directive, contract takes precedence over exceptions in an online context. Recital 53 of the Directive states that:

The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

This is restated in Article 6(4), which says copyright owners may prevent users from benefiting from all exceptions to copyright in relation to works supplied online under agreed contractual terms. In fact, the principle of contractual freedom over exceptions may be enforced by technology. Technology may enable copyright owners to enter into non-negotiated electronic contracts with end users. Such users may or may not understand the contractual terms and conditions imposed by content

¹⁵⁵ Lucie Guibault, Guido Westkamp, Thomas Rieber-Mohn, Bernt Hugenholtz, Mireille van Eechoud, Natali Helberger, Lennert Steijger, Mara Rossini, Nicole Dufft and Philipp Bohn, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', Report to the European Commission, DG Internal Market, p. 106, February 2007
<www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf> accessed 6 August 2017.

providers, which may mean that they are unable to benefit from an exception, or are restricted by licensing agreements enforced by DRM.¹⁵⁶

The remedies against such unfair contractual clauses are to be found in general law, such as consumer protection law or competition law. However, such clauses still create uncertainty for visually impaired persons when accessing copyright works, especially in the online environment.¹⁵⁷ Establishing compulsory licences or regulating standard forms of contract may be possible solutions.

In addition, there are serious concerns about the use of TPMs. For example, in the UK, copyright expires 70 years after the death of the creator. At that point—with the copyright holder's monopoly having expired—the copyright work enters the public domain, to be used or exploited by anyone. However, TPMs make it possible to continue the monopoly, by controlling use of the work. TPMs are not currently applied to copyright works with an automatic expiry date. Therefore, the time-limited monopoly currently afforded by copyright law could become continuous, through the use of TPMs.¹⁵⁸ Public domain knowledge may be monopolised and controlled, using TPMs.¹⁵⁹ The All Party Internet Group has described the

¹⁵⁶ Mihály J. Ficsor, 'Commentary to the Marrakesh Treaty on accessible format copies for the visually impaired, Copyright See-Saw' 11 October 2013 <http://www.copyrightseesaw.net/archive/?sw_10_item=50> accessed 6 August 2017. See also Akester, 'The New Challenges of Striking the Right Balance between Copyright Protection and Access to Knowledge, Information and Culture' (n 76) 376.

¹⁵⁷ Akester, 'The New Challenges of Striking the Right Balance between Copyright Protection and Access to Knowledge, Information and Culture' (n 76) 376.

¹⁵⁸ Catherine Stromdale, 'APIG Fails to Change the DRM Record' (2006) 17(8) Ent LR 229, 230.

¹⁵⁹ The Infosoc Directive Implementation Report of 24.6.2015 calls 'on the Commission to safeguard public domain works, which are by definition not subject to copyright protection and should therefore be able to be used and re-used without technical or contractual barriers; also calls on the Commission to recognise the freedom of rightholders to voluntarily relinquish their rights and dedicate their works to the public domain. See European Parliament, 'Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))' <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0209&language=EN>> accessed 6 August 2017.

prevention of access for the disabled as one of the more undesirable effects of TPMs—i.e. when specialist hardware or software that converts works into speech, Braille, or large type, fails to interact with material protected by TPMs. The All Party Internet Group recommended that the Department for Culture, Media and Sport review the level of funding available for pilot projects addressing access to e-books, and then act if such funding does not appear to be achieving the desired result.¹⁶⁰

Copyright holders can use any type of technology to protect their works. Although copyright law allows copyright holders to adopt TPMs for any work over a specified period of time, TPMs may still be attached to such works after the specified time has expired. In that situation, people who circumvent TPMs would not be regarded as infringing copyright. Nevertheless, this still raises two problems. First, not everyone has sufficient technological skill to circumvent TPMs. Second, it may be difficult to find appropriate devices in the market, since they would contravene legislation if people used them to circumvent TPMs for works whose copyright had not expired.¹⁶¹

Under the EU Copyright Directive, one of the most important exemptions covers the right of disabled persons to convert copyright works into accessible formats. The Copyright (Visually Impaired Persons) Act 2002 also implemented an exemption that allows visually impaired persons to circumvent TPMs and not infringe copyright in the UK.¹⁶² From the perspective of the visually impaired, if the use is directly related to the visually impaired person, and is of a non-commercial nature, Article 5 of the Act deals quite well with the issue of disability when the

¹⁶⁰ Stromdale (n 158) 231.

¹⁶¹ Thipsurang Vathitphund, 'Access to Knowledge Difficulties in Developing Countries: A Balanced Access to Copyrighted Works in the Digital Environment' (2010) 24 IRLCT 7, 13.

¹⁶² Ian Brown, 'The Evolution of Anti-circumvention Law' (2006) 20 IRLCT 239, 251.

systems in place fail to accord them their rights. For example, the disabled are also likely to be disproportionately affected by levies on items such as blank tapes. Providing rights to block and disable devices is also likely to provide obstacles for the disabled.¹⁶³

5.3 Conclusion

Anti-circumvention laws are not comprehensively applauded. For example, the most prevalent complaint against the UK's anti-circumvention rules is their lack of flexibility, especially in ensuring access to works by users with disabilities. Under the present system, visually impaired persons face complex processes when accessing copies; the cumbersome and slow procedure of applying to a state official—in order to gain access to copyright work—hardly encourages utilisation.¹⁶⁴ The development of new technologies not only raises the possibility of providing access to persons with disabilities, but may also allow independent access in a way that was only possible before with human assistance.

However, there are still many problems for persons with disabilities when trying to use information technology products and services. One of the problems is that services may lack functionality—for example, websites which are too complicated for cognitively impaired or inexperienced users, or which are difficult for visually impaired persons to read and navigate. There may also be a lack of accessible content, and the physical design may be difficult to use.¹⁶⁵

¹⁶³ Ivor Griffiths and Michael Doherty, 'The Harmonisation of European Union Copyright Law for the Digital Age' (2000) 22 EIPR 17, 19.

¹⁶⁴ Christina J. Angelopoulos, 'Modern Intellectual Property Legislation: Warm for Reform' (2008) 19(2) Ent LR 35, 37.

¹⁶⁵ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, Brussels, 13.9.2005, COM(2005)425 final
<http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0425en01.pdf> accessed 6 August 2017.

Full and equitable access to information is essential if visually impaired persons are to compete on equal terms in education and employment, enjoy all aspects of daily life, and realise the potential opportunities that modern technology offers. However, there are several problems regarding DRMs and the interests of visually impaired persons. For example, DRM systems applied to e-books and e-documents can prevent access by people who use assistive technology to read screens or control their computer. In those circumstances, visually impaired persons may be prevented from achieving the same degree of access as their sighted counterparts, or indeed from achieving any access at all. The Marrakesh Treaty provides a general exception that it should be legal to circumvent TPMs when accessing works, where that access protects the rights of visually impaired persons, confirms the fair use doctrine, and—under the Three-Step Test—does not affect copyright holders’ commercial profits. Thus, Article 7 of the Marrakesh Treaty should achieve a balance between the rights of authors and the wider public interest.¹⁶⁶

In order to increase opportunities for visually impaired persons to access works, while protecting the interests of copyright holders, the final chapter provides an evaluation of access to copyright works for visually impaired persons, and recommendations for its improvement.

¹⁶⁶Note that the Infosoc Directive Implementation Report of 24.6.2015 calls for a ‘single European Copyright Title on the basis of Article 118’ which would facilitate the EU ratification of the Marrakesh Treaty and its exceptions. See European Parliament, ‘Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))’ (n 159).

Chapter 6 Recommendations for improved access to copyright works for the visually impaired

The important significance of the Marrakech treaty is to promote the production, dissemination and cross-border communication of barrier-free formats. It will promote the production, distribution and international communication of barrier-free formats worldwide and enrich braille documents, audiobook books for the blind, books for people with low vision and other cultural products for the blind. The Marrakesh treaty provides guarantees for the visually and dyslexic to access information in a barrier-free format using new technologies. It is the theoretical embodiment of the more flexible copyright system that the visually impaired and dyslexic people benefit from according to the current technological situation. It is an important way to protect their right to read, participate in the society and receive education. The WIPO treaties on copyright should serve as a torch in the ongoing search, by scholars and policy-makers, to find the right definitional boundaries of global copyright norms.¹⁶⁷ Before the enactment of the Marrakesh Treaty for visually impaired persons, there was no international framework to facilitate the distribution of accessible versions of copyright works from one country to another.¹⁶⁸ However, to deny access for visually impaired persons is to make society the poorer—with the loss of their potential creativity and innovation.

The preceding chapters describe many of the obstacles and problems which visually impaired persons encounter when accessing copyright works. They also identify a number of legislative and other measures to improve access—the most important of which are: (1) broader copyright limitations and exceptions in favour of

¹⁶⁷ Jörg Reinbothe and Silke von Lewinski, 'The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP' (2016) E.I.P.R. 2016, 38(1), 66, 68.

¹⁶⁸ Library Copyright Alliance, 'Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons' 12 October 2009, p. 1
<www.librarycopyrightalliance.org/bm~doc/briefvifinalrev101509.pdf> accessed 9 March 2012.

visually impaired persons; (2) improved cross-border licensing; and (3) greater focus by collecting societies on the receipt of royalties from works for visually impaired persons.

This chapter describes two possible ways of improving access to copyright works: first, by providing accessible formats for visually impaired persons—thereby avoiding the issue of technological equipment and resources—and second, by improving licensing systems and granting appropriate and clear remuneration to copyright holders, who will thereby be more likely to permit the supply and exchange of their works for visually impaired persons.

A number of different organisations and scholars have initiated projects and feasibility studies to address ways of improving access to copyright works. This chapter discusses and evaluates some of these initiatives.

6.1 Proposals to address accessible formats for the visually impaired

6.1.1 Memorandum of Understanding by the European Commissioner

In order for the internal market to benefit from allowing easier transmission of copyright works, the EU Copyright Directive of 2001 aims to harmonise copyright protection among EU Member States. It defines the primary exclusive rights of copyright holders, which include the reproduction right, the right to communication to the public, and the distribution right. Besides this, Article 5 sets out an exhaustive list of exceptions to these rights for the benefit of users of copyright works.¹⁶⁹

In 2010, the European Commissioner for the Internal Market and Services signed a Memorandum of Understanding on access to works for dyslexic or visually

¹⁶⁹ Favale, ‘Approximation and DRM: Can Digital Locks Respect Copyright Exceptions?’ (n 149) 309.

impaired readers.¹⁷⁰ Although all EU Member States have implemented exceptions to copyright that benefit dyslexic or visually impaired readers, these exceptions complicate cross-border distribution. The Memorandum of Understanding will improve this situation with a distribution system based on ‘trusted intermediaries’,¹⁷¹ which can be institutions such as associations for the blind, libraries and special schools. Also, the Memorandum sets out a system of mutual recognition among trusted intermediaries so that registered persons are able to access books from all over the EU. In other words, the Memorandum marks an important and concrete step towards increasing the number of books that can be used for study or leisure by visually impaired persons. The agreement will make it much easier to distribute items—such as Braille and audio-books—across EU Member States. The Memorandum of Understanding is also an important step in realising the objectives of the Digital Agenda for Europe—namely to enable people with disabilities to gain full access to the benefits of the digital society.¹⁷²

6.1.2 The European Commission Green Paper

In 2008, the European Commission’s Green Paper, ‘Copyright in the Knowledge Economy’, introduced a consultation to promote a structured debate on copyright policy. Although the Commission recognises that a high level of copyright protection is crucial for intellectual creativity, it also considers that the wider dissemination of

¹⁷⁰ Dan Pescod (on behalf of the European Blind Union) and Alicia Wise (on behalf of the Federation of European Publishers), ‘EU Stakeholders Dialogue Memorandum of Understanding (MOU) on access to works by people with print disabilities’
<http://ec.europa.eu/internal_market/copyright/docs/copyright-info/2010/20100914_mou_en.pdf> accessed 6 August 2017.

¹⁷¹ A trusted intermediary (TI) is generally any entity that facilitates interactions between two parties who both trust the third party. See also *ibid*.

¹⁷² Europa, ‘Copyright: Commissioner Barnier Welcomes Agreement on Greater Access to Books for the Visually Impaired’ Brussels, 14 September 2010
<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1120&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 6 August 2017.

knowledge contributes to more inclusive and cohesive societies.¹⁷³ The Green Paper clearly states:¹⁷⁴

‘People with a disability should have an opportunity to benefit from the knowledge economy. To this end, they not only need physical access to premises of educational establishments or libraries, but also the possibility of accessing works in formats that are adapted to their needs (e.g. Braille, large print, audio-books and accessible electronic books).’

Two issues are presented in the Green Paper. The EU Copyright Directive does not require copyright holders to make their works available in particular formats. The first issue, therefore, is how to provide relevant organisations with a non-protected digital copy for the creation of versions in accessible formats, while also addressing the concerns of copyright holders about security and the protection of their works. The second issue concerns Directive 96/9/EC on the legal protection of databases. Article 6 (2)¹⁷⁵ of this Directive provides for exceptions for teaching or scientific research, and reproduction for private use, but there is no exception for disabled people. This raises a concern that the exception for people with a disability

¹⁷³ Catherine Seville, ‘Intellectual Property’ (2011) 60 ICLQ 1039, 1041.

¹⁷⁴ Green Paper of the Commission of the European Communities, ‘Copyright in the Knowledge Economy’ Brussels, 2008 COM 466/3 final
<http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf> accessed 6 August 2017. The Green Paper is essentially in two parts. The first part deals with general issues regarding exceptions to exclusive rights introduced in the main piece of European copyright legislation – Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (‘the EU Copyright Directive’). The other piece of copyright legislation that is relevant for the knowledge economy, is Directive 96/9/EC on the legal protection of databases.

¹⁷⁵ Article 6 (2) of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases states that ‘Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases: (a) in the case of reproduction for private purposes of a non-electronic database; (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure; (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).’

in Article 5(3) (b) of the Copyright Directive could be challenged if a particular work is simultaneously protected as a database. For example, an encyclopaedia is simultaneously protected as a work and as a database.¹⁷⁶

The Green Paper discusses not only the application of exceptions in Article 5 of the EU Copyright Directive, it also asks whether non-mandatory exceptions are adequate in light of evolving internet technologies.

In any discussion of exceptions in the digital environment, two other issues must be resolved: one concerns the relationship between copyright law and contract law; and the other the connection between exceptions and TPMs. Most electronic material in libraries is subject to a licence. Because contract law usually takes precedence over copyright law, anything that the library agrees to in a licence is usually binding, regardless of the relevant copyright law. The principle of ‘freedom of contract’, however, often puts libraries at a disadvantage, because the copyright holder has an exclusive, monopoly right over the material. As the starting position of the parties is unequal, it can be difficult or even impossible for the library to negotiate better terms, thus making it possible that publicly funded institutions have to spend time negotiating provisions that are otherwise available under copyright law. In order to deal with this problem, legislators have provided the solution that a contractual provision opposing the exceptions shall be null and void, pursuant to Article 15 of the Database Directive.¹⁷⁷

The second issue is the relationship between exceptions and TPMs. The application of Article 11 of the WCT in Europe, via Article 6 of the EU Copyright

¹⁷⁶ Green Paper of the Commission of the European Communities (n 174).

¹⁷⁷ EIFL, ‘EIFL response EC Green Paper Copyright in the Knowledge Economy’ November 2008 <www.eifl.net/eifl-response-ec-green-paper-copyright-knowledge-e> accessed 21 February 2012.

Directive, gave copyright holders a new tool to enforce their rights. Copyright holders can take advantage of technology to set the rules for access and usage, and they can override exceptions that exist for the benefit of users. Legislators attempted to address this problem by encouraging voluntary agreements between parties in the first instance, and by providing that Member States must ensure that beneficiaries prevail, subject to certain exceptions. Nevertheless, online content which is subject to a licence is excluded from this safeguard.

The combination of contract terms and TPMs has offered copyright holders significant new ways of controlling the use of digital content. Even if the mandatory exceptions raised in the Green Paper were accepted, harmonisation would still not be achieved.¹⁷⁸

6.1.3 Trusted Intermediary Global Accessible Resources (TIGAR) and the Enabling Technologies Framework (ETF)

The visually impaired person initiative was developed by WIPO to provide a platform for initiatives to facilitate access to information and cultural content for visually impaired persons. There are two components of the initiative. First, is the Trusted Intermediary Global Accessible Resources (TIGAR) project, which focuses on enabling publishers to make their titles available to trusted intermediaries, across borders, in order to serve people with disabilities. Second, is the Enabling Technologies Framework (ETF) project, which aims to develop mainstream publishing processes which are capable of delivering digital publications that are fully accessible to people with reading disabilities.

¹⁷⁸ *ibid.* The Infosoc Directive Implementation Report of 24.6.2015 calls for a ‘single European Copyright Title on the basis of Article 118’ which would facilitate the EU ratification of the Marrakesh Treaty. See European Parliament, ‘Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))’ (n 143).

WIPO provides substantial support, services, and funding to the visually impaired person initiative and its related projects and activities. Such works focus on developing best practice guidelines¹⁷⁹ for publishers to follow during the production process, and where appropriate to integrate existing standards—such as ONIX, ePub and DAISY—into mainstream publishing. In addition, the visually impaired person initiative includes a capacity building component to ensure that a wide range of visually impaired persons’ activities—in both developed and developing countries—benefit from the initiative.¹⁸⁰

The TIGAR project seeks to facilitate the cross-border exchange of copyright-protected electronic book files in accessible formats—between national libraries and charitable institutions—to serve the blind, visually impaired, and other persons with print disabilities. To expand the repertoire of adapted works available to individual print-disabled persons in their countries is one of the benefits of this exchange in the short term. Trusted intermediaries can significantly reduce the costs of production—and help to further expand the range of accessible books available—by increasing the use of electronic source files from publishers and the ongoing exchange of books. The target completion date for the three-year pilot project is the end of 2013, and the primary deliverables include:

- (1) An established network of trusted intermediaries (TIs) that are exchanging electronic files of books across borders in accessible formats in a systemised manner using an agreed framework for copyright clearance.
- (2)

An ICT component that enables: 1. secure and transparent exchange of

¹⁷⁹ WIPO, ‘Accessible Publishing Best Practice Guidelines for Publishers’ <www.visionip.org/technology/en/accessible_best_practice_guidelines_for_publishers.html> accessed 13 February 2012.

¹⁸⁰ WIPO, ‘Presentation of WIPO’s Activities for the IGF Workshop: Copyright through a magnifying glass: thought-provoking ideas’ <www.isoc.org/pubpolpillar/docs/igf2011-wipo.pdf> accessed 6 August 2017.

electronic files between TIs, including those provided by publishers; 2. search, discovery and access to books in accessible formats that are available from both TIs and commercial collections; and 3. search of ‘work in progress’ information about books that are in the process of being converted to an accessible format by a TI in order to prevent duplication in production. (3) A sustainable business model to support the above on an ongoing basis.¹⁸¹

After analysing the proposed terms of the TIGAR pilot scheme and the stakeholder agreements more broadly, WBU considered that the terms would be too difficult, and the cost benefits too uncertain. Besides this, the project may be feasible for larger organisations in developed countries, but is quite difficult for organisations in developing countries.¹⁸²

As a result, many developing and developed nations have concerns about the WIPO approach. They want to use limitations and exceptions to increase the volume of accessible books moving across national borders, in order to reduce the need to duplicate the costs of conversion in individual countries. There are therefore two parallel processes currently ongoing in WIPO. One is to negotiate an international treaty or instrument obliging signatory nations to make their converted works available to visually impaired persons in other countries. The other is the international exchange pilot programme, TIGAR.¹⁸³

¹⁸¹ WIPO, ‘TIGAR Project’ <www.visionip.org/tigar/en/> accessed 13 February 2012.

¹⁸² Catherine Saez, Intellectual Property Watch, ‘World Blind Union Won’t Be Sidetracked in Quest for Treaty on Reading Access’ 10 March 2011 <www.ip-watch.org/2011/03/10/world-blind-union-won%e2%80%99t-be-sidetracked-from-quest-for-treaty-on-reading-access/> accessed 16 February 2012.

¹⁸³ Australian Copyright Council, ‘WIPO Pushes for Greater Access to Books for the Vision Impaired’ 28 February 2011 <www.copyright.org.au/news-and-policy/details/id/1886/> accessed 25 February 2012.

Both the US and the European Union stipulate that accessible digital formats should be imported and exported only through what are known in the proposals as ‘trusted intermediaries’. The trusted intermediaries could refer to governmental or non-profit organisations that control the creation of accessible formats and ensure that they are distributed to bona fide persons with a print disability. However, even though the EU and the US agree that trusted intermediaries are the way forward, their proposals differ significantly in other ways. The EU document contains a relatively long list of eligibility requirements and obligations for trusted intermediaries. However, the US proposal takes a much lighter approach. Those opposed to an international treaty or instrument argue that international legislation is already sufficient to facilitate cross-border transfer, and that the real problem is administrative. Therefore, a global database of available works is needed, together with a secure system for transferring them.

It is for this reason that WIPO set up the TIGAR pilot project—to lay practical foundations for the delivery of electronic files across borders via trusted intermediaries. The pilot project was devised by representatives of creators, publishers, reproduction rights organisations, and the vision-impaired sector. TIGAR is currently working on the adoption of model file-transfer and rights-clearance agreements, for use by a global network of trusted intermediaries. Nevertheless, the process will take time, and there are also likely to be debates about who should bear the costs.¹⁸⁴

The ETF project—started in June 2010—is funded by WIPO, endorsed by the Stakeholders Platform of WIPO, and is a joint project involving both EDItEUR—the international group coordinating development of the standards

¹⁸⁴ *ibid.*

infrastructure for electronic commerce in the book, e-book and serials sectors—and the DAISY Consortium. The goal is to develop mainstream publishing processes in order to deliver digital publications that are fully accessible to people with reading disabilities. If the goal is achieved, publishing processes should be able to yield digital products that can be used effectively by each member. The essential usability of digital publications should also meet the needs of both mainstream users and persons with disabilities. The target is to allow the same product to be used by everybody.¹⁸⁵

6.1.4 The European Disability Strategy 2010–2020

With their signing of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the EU and all its Member States have committed themselves to construct a barrier-free Europe. Although the member countries have the main responsibilities, the EU Treaties provide a basis for combating discrimination against people with disabilities, and the EU Charter of Fundamental Rights recognises their right to benefit from guarantees to their independence, social and occupational integration, and participation in the community.¹⁸⁶ Its objectives are followed by actions in eight priority areas:¹⁸⁷

- (1) Accessibility: make goods and services accessible to people with disabilities and promote the market of assistive devices.
- (2) Participation: ensure that people with disabilities enjoy all benefits of EU citizenship;

¹⁸⁵ EDItEUR, 'Enabling Technologies Framework'

<www.editeur.org/109/Enabling-Technologies-Framework/> accessed 13 February 2012.

¹⁸⁶ European Commission, 'European Disability Strategy 2010–2020'

<http://ec.europa.eu/justice/discrimination/disabilities/disability-strategy/index_en.htm> accessed 6 August 2017. See also Europa, 'Equal Opportunities for People with Disabilities: a European Action Plan (2004–2010)'

<http://europa.eu/legislation_summaries/employment_and_social_policy/disability_and_old_age/c11414_en.htm> accessed 6 August 2017.

¹⁸⁷ European Commission, 'European Disability Strategy 2010–2020' (n 186).

remove barriers to equal participation in public life and leisure activities; promote the provision of quality community-based services. (3) Equality: combat discrimination based on disability and promote equal opportunities. (4) Employment: significantly raise the share of persons with disabilities working in the open labour market. (5) Education and training: promote inclusive education and lifelong learning for students and pupils with disabilities. (6) Social protection: promote decent living conditions, combat poverty and social exclusion. (7) Health: promote equal access to health services and related facilities. (8) External action: promote the rights of people with disabilities in the EU with regards enlargement and international development programmes.

6.1.5 The role of libraries in improving access for visually impaired persons

It is common practice for people with a print disability to access alternative formats through an appointed organisation or specialised library in their country. Users may access materials from other countries by using an inter-library loan, but they may have to wait months to receive their order. When going through normal channels, there is a problem of conversion, because the number and range of books available is hampered by the time-consuming and costly process of converting print into accessible formats, even though such work to assist people with disabilities is typically done by government-funded organisations. Nevertheless, with digital technologies transforming the publishing business—from creation to distribution—there are new opportunities for visually impaired persons to benefit through lower-cost digital conversion and distribution. The final objective is for visually impaired persons to be able to access and purchase any book in an accessible format, in the same way as sighted people. Although these new technologies are

making this model more achievable, there is still a long way to go in poorer countries, and even in smaller developed countries.¹⁸⁸

In 2012, Electronic Information for Libraries (EIFL) released a new guide, ‘Developing a Library Copyright Policy’. This guide is designed to focus on the issues that arise when a library is considering the creation of a copyright policy, whether on its own initiative or as part of a wider institutional policy on intellectual property. It considers not only how to go about drafting a policy, but also the elements that a library copyright policy might contain.¹⁸⁹ A library copyright policy is an instrument to provide clarity on copyright issues that arise during the provision of library services, and is intended to help manage risk for the library and its parent institution. It aims to achieve three basic objectives:¹⁹⁰

- (1) Compliance – consistency in managing the copying of copyrighted materials by library staff and users in order to avoid infringing activities, and compliance with the copyright law in your country and the licences applicable to electronic resources in your library.
- (2) Guidance – clear guidelines to staff and users of the library on aspects of library services and the use of library resources that relate to copyright.
- (3) Education – educating library staff and end users such as academics and students about copyright and what they may and may not do.

¹⁸⁸ Mary Anne Reid, Australian Copyright Council, ‘WIPO Pushes for Greater Access to Books for the Vision Impaired’ February 2011
<www.copyright.org.au/news-and-policy/show-news-from-year/type/news/year/2011/pid/9/>
accessed 19 February 2012.

¹⁸⁹ International Federation of Library Associations and Institutions (IFLA), ‘New EIFL guide: Developing a Library Copyright Policy’ 21 February 2012
<www.ifla.org/en/news/new-eifl-guide-developing-a-library-copyright-policy> accessed 6 August 2017.

¹⁹⁰ EIFL, ‘Developing a Library Copyright Policy’
<www.eifl.net/developing-library-copyright-policy> accessed 26 February 2012.

A library copyright policy must be reviewed and updated regularly to reflect the information environment in which the library is operating, especially: changes in national legislation or to licences that manage the use of electronic resources in the library; changes to the usage of library materials by staff and end users; and the introduction of new facilities.¹⁹¹

6.2 **Adjusting remuneration via rights management**

6.2.1 Collective rights management for extending copyright licensing

Collective rights management is the licensing of copyright and related rights by ‘collecting societies’. Users cannot negotiate all copyright holder licences if they want to copy or access works, therefore the activities of collecting societies can help to solve such problems. Collecting societies manage the rights of copyright holders, typically the authors, artists, and/or producers of the copyright works. They charge a fee to commercial users—including both traditional users of such content and new media operators. Collecting societies collect royalties from users of copyright works and distribute royalties to copyright owners. Societies monitor the use of the works, such as music, and enforce the payment of royalties which are then distributed to copyright holders.¹⁹²

In the UK¹⁹³, the Copyright Licensing Agency (CLA) Licence¹⁹⁴ permits universities to make enlarged photocopies for visually impaired students and staff. It

¹⁹¹ *ibid.*

¹⁹² Bill Batchelor, ‘Antitrust Challenges to Cross-Border Content Licensing: The European Commission Investigations of Collecting Societies and iTunes’ (2007) 13(8) *CTLR* 217, 217.

¹⁹³ ‘Collective administration is compulsory in the case of cable retransmission rights of authors’ (s. 144A (2) CDPA). The CDPA provides: (1) the right to equitable remuneration of authors and performers for the rental of sound recordings and films (s. 93B CDPA and s. 191G CDPA); (2) performers’ right to equitable remuneration for the use of sound recordings for playing in public and communication to the public except for electronic transmission (s. 182D CDPA) may not be assigned by the author (performer) except to a collecting society for the purpose of enabling it to enforce the right on his behalf. See European Affairs, ‘The Collective Management of Rights in Europe’ July 2006, p. 91
<www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights

is possible to copy the whole or part of a copyright work for this purpose, provided it is covered by the CLA Licence and is not on the CLA list of excluded categories and works.¹⁹⁵ The CLA represents international copyright holders through its bilateral agreements with overseas reproduction rights organisations (RROs). These agreements allow the CLA to collect money for the copying of overseas works and publications. Such money is distributed to international copyright holders via their local RROs. All of their international agreements include not only photocopying but also scanning and, in many cases, the re-use of digital materials.

There are three types of bilateral agreement concerning the reciprocal exchange of repertoire and fees between RROs. The first type authorises full exchange of repertoire and fees, according to the principle of ‘national treatment’. The second type is a graduated agreement, starting with an exchange of repertoire only, and progressing towards a reciprocal exchange of fees over time. The third type is the Digital Repertoire Exchange Agreement, which authorises the full exchange of repertoire and fees in accordance with the principle of ‘national treatment’, and includes the exchange of digital rights.¹⁹⁶

Although the CLA could provide more access to copyright works for visually impaired persons, the CLA is a UK-only organisation. Therefore, to expand

-/study-collective-management-rights-en.pdf> accessed 6 August 2017.

¹⁹⁴ The Copyright Licensing Agency Limited (CLA) is a licensing body as defined by the CDPA. The CLA was set up in 1983 and is owned by the Authors' Licensing and Collecting Society Ltd (ALCS) and the Publishers' Licensing Society Ltd (PLS) to perform collective licensing on their behalf. See About CLA, ‘The Copyright Licensing Agency’ <www.cla.co.uk/about/who_we_are/> accessed 3 March 2012.

¹⁹⁵ ‘Copyright Issues relating to the Visually Impaired’ <www.staffs.ac.uk/legal/copyright/visually_impaired/#enlarged> accessed 9 February 2012. Lists of excluded categories include printed music (including the words), maps and charts, newspapers, any work on which the copyright owner has expressly and prominently stipulated that it may not be copied under a CLA licence, workbooks, workcards or assignment sheets. See also ‘The Copyright Licensing Agency, Excluded Categories and Excluded Works’ <www.cla.co.uk/excluded_works/excluded_categories_works/> accessed 9 February 2012.

¹⁹⁶ The Copyright Licensing Agency, ‘Information for International Rightsholders’ <www.cla.co.uk/rightsholders/international_rightsholders> accessed 3 March 2012.

access to works for visually impaired persons, the issue of cross-border licensing needs to be considered.

In 2005, the European Commission published a study on the cross-border collective management of copyright. The report described the main issues involved and highlighted the difficulties in creating the required number of agreements, as well as the issue of legal uncertainty.¹⁹⁷ In 2014, the European Commission adopted Directive 2014/26/EU on collective rights management and the multi-territorial licensing of rights in musical works for online uses. The aim of the Directive is to facilitate the multi-territorial licensing—by collecting societies—of authors' rights in musical works for online use. The Directive could act as a general model for extended collective licensing for visually impaired persons.

In 2016, the CLA established the Digital Content Store (DCS). The DCS is a searchable, cross-institution repository of PDF extracts created by Higher Education Institutions (HEIs) for use in digital course packs. Once an HEI digitises an extract, it may be assigned to a course for students to access via a secure link. Moreover, the DCS reduces administration, as PDFs are captured by the system, removing the need to manually report what is being copied. The DCS has completed 52% of content reported to the CLA. It has also integrated the British Library and CLA's Enhanced Higher Education Supply Service (EHES) document delivery and outsourced scanning service. In addition, the DCS has reduced scanning time for the 5% of DCS content which is used by multiple HEIs.¹⁹⁸

¹⁹⁷ Daniel Gervais, *Collective Management of Copyright and Related Rights* (Kluwer Law International 2010) 153.

¹⁹⁸ The Copyright Licensing Agency, 'The Digital Content Store Celebrates Its First Birthday' <<https://www.cla.co.uk/news-DCS-birthday>> accessed 31 August 2017.

The main advantages of the DCS are: first, it integrates with major library management systems and reading list solutions to provide one streamlined tool; second, it reduces the administrative burden by automating weeding and streamlining renewals; and third, it guarantees to deliver definitive permissions regarding included and excluded titles, providing total copyright compliancy assurance.¹⁹⁹

6.2.2 Establishing a Digital Copyright Exchange (DCE) to increase access

Collecting societies tend to focus on the music market, however there are other types of copyright works which need to be considered, based on their particular characteristics. The goal of a Digital Copyright Exchange (DCE) is to work as ‘a functioning online licensing market to support delivery of legitimate content to consumers in attractive and competing offerings through the many available channels’. The key objective of a DCE is to improve the efficiency and mechanics of clearing rights, and to establish ‘a network of interoperable databases to provide a common platform for licensing transactions’.²⁰⁰ Therefore, establishing a DCE would provide an easily accessible process that would minimise transaction costs,²⁰¹ and provide reliability in both price and access, while reducing the need to try to find the copyright holder.²⁰² In the UK, the government has proposed working with businesses in an attempt to establish a DCE.²⁰³

All UK creative industries would be included in proposals for the DCE—it would not be restricted to the music industry.²⁰⁴ In order to progress matters, the UK

¹⁹⁹ The Copyright Licensing Agency, ‘Digital Content Store’
<<https://www.cla.co.uk/digital-content-store>> accessed 31 August 2017.

²⁰⁰ Ian Hargreaves, ‘Digital Opportunity – A Review of Intellectual Property and Growth’ May 2011
<www.ipo.gov.uk/ipreview-finalreport.pdf> accessed 6 August 2017.

²⁰¹ *ibid*

²⁰² Claire Howell, ‘The Hargreaves Review: Digital Opportunity: A Review of Intellectual Property and Growth’ (2012) 1 JBL 71, 74.

²⁰³ *ibid* 83.

²⁰⁴ Nick Rose and Michael Sweeney, ‘The Hargreaves Report’ (2011) 22(7) Ent LR 201, 203.

needs to adopt a twin-track approach: first, to urgently pursue specific exceptions that would also be practicable within the current EU framework; and second, to explore—with EU partners and at the EU level—new mechanisms to create in-built adaptability to future technologies.

Such technologies include the use of copyright works, where copying is carried out as an integral aspect of how the technology works. For instance, in data mining or search engine indexing, copies need to be made in order for the computer to analyse the data—with technology substituting for someone reading all the documents. This is not about interfering with the aims of copyright, because these uses do not compete with the normal exploitation of the work itself, even though they may facilitate it. Such uses are essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.²⁰⁵

The CLA believes that the copyright licensing system is broadly fit for purpose, although it can be further improved through measures to strengthen the enforcement regime, thereby encouraging investment not only in the creation of copyright works but also in online permission systems of the type envisaged by the DCE. Moreover, it believes that collective blanket licensing of the sort offered by the CLA still offers a flexible solution to meet the needs of most users. A DCE for the publishing industry could potentially offer cross-media permission, where justified by the market and supported by copyright holders, and this could address user requirements in the future.²⁰⁶

²⁰⁵ Hargreaves (n 200).

²⁰⁶ CLA, 'Digital Copyright Exchange Feasibility Study. Response from the Copyright Licensing Agency Ltd ("CLA")' 13 February 2012, p. 4
<www.cla.co.uk/data/corporate_material/submissions/2012_cla_submission_on_dce_feasibility_study_feb2012.pdf> accessed 5 March 2012.

The introduction of a DCE could provide a better model for tackling the shortcomings of the CLA, as it would not only address issues around the provision of online material, but also around cross-border licensing. Thereby, visually impaired persons would have greater opportunities to access copyright works, while at the same time avoiding copyright infringement.

6.3 Conclusion

The heart of the Marrakesh Treaty is cross-border sharing of accessible books—both between organisations, and directly from organisations to visually impaired persons—without complicated requirements for checks on whether those copyright works are commercially available in the receiving country.²⁰⁷ The Marrakesh Treaty has enjoyed strong support from countries across the world, and officially came into force in 35 countries before January 9, 2018.²⁰⁸ The ratifying countries will face a variety of legal and policy choices as they decide how to incorporate the Marrakesh Treaty into their national legal systems. These choices will determine how to enhance the human rights of visually impaired persons by facilitating their ability to create, read, and share books and other cultural materials in accessible formats.²⁰⁹ The Marrakesh Treaty undoubtedly promotes the access rights of visually impaired persons—through broader limitations and exceptions to copyright, and by establishing an import/export regime for the exchange of accessible books across borders. It is also consistent with the Three-Step Test in protecting the income of copyright holders. However, with changes in the technological environment, the

²⁰⁷ European Parliament, ‘The Marrakesh Treaty’ (n 145).

²⁰⁸ WIPO, ‘WIPO-Administered Treaties’

<http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843> accessed 28 February 2018.

²⁰⁹ Laurence R. Helfer, Molly K. Land, Ruth L. Okediji and Jerome H. Reichman, ‘The World Blind Union Guide to the Marrakesh Treaty’ September 2017 <<http://www.worldblindunion.org/English/our-work/our-priorities/Documents/Final%20Version%20-%20WBU%20Guide%20to%20the%20MT.docx>> accessed 31 August 2017.

Marrakesh Treaty does not address how, in practice, to ensure access by beneficiaries.

In 2017, the European Parliament approved the Directive and the Regulation that implement the Marrakesh Treaty. Member States must bring into force—by 11 October 2018—laws, regulations and administrative provisions necessary to comply with this Directive. The Directive and Regulation successfully incorporate the Marrakesh Treaty into EU law and not only improve its content, but also clarify possible ambiguities. Member States of the EU will therefore be able to adopt harmonised legislation covering limitations and exceptions in favour of visually impaired persons.²¹⁰

The Marrakesh Treaty has the potential to increase significantly the availability of copies in formats accessible to visually impaired persons, both within and outside the EU. To realise this potential, libraries and other institutions that serve visually impaired persons will play an important role in implementing access rights and encouraging governments to use the Directive to increase and facilitate access.²¹¹ However, improving access rights for visually impaired persons, while at the same time ensuring appropriate remuneration for copyright holders—i.e. harmonising the interests of all parties—will inevitably be difficult for legislators. Article 3(6) of the Directive allows Member States the option to provide compensation schemes. However, such schemes would be costly and could place unacceptable restrictions on the ability of libraries and others to fulfil the objectives of the treaty.²¹² A comprehensive assessment is needed to determine how, in practice, to encourage the

²¹⁰ Vasileios Antoniadis, 'Persons with Disability and Copyright Law: An Analysis of the Regulation (EU) 2017/1563 and the Directive (EU) 2017/1564' 7 March 2018
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131283> accessed 24 May 2018.

²¹¹ IFLA, 'Implementing the Marrakesh Treaty in European Union Member States' (n 146).

²¹² EBLIDA, 'Implementing the Marrakesh Treaty in European Union Member States' (n 116).

exchange of accessible works by authorised entities. For example, governments could help to establish systems for libraries to share their resources—similar to systems for inter-library cooperation. Sharing such systems will reduce costs for obtaining accessible works and avoid duplication of resources. Designing compensation schemes is likely to be a more difficult task, although Recital 14 of the Directive could assist in determining levels of compensation.

How members implement the treaty will be a significant factor in maximising the benefit for visually impaired people. Measures could be implemented to ensure that beneficiaries are not prevented from cross-border sharing of materials, and to avoid any measures that will harm legitimate cross-border exchanges.²¹³ Similarly, the treaty needs to improve the effectiveness and efficiency of its online environment provisions, to assure continuing access opportunities for visually impaired persons.

²¹³ *ibid.*

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APPENDIX1

QUESTIONNAIRE

Through this brief questionnaire, your answers will be helpful in enhancing my research. Your response will only be used for research purposes.

Thank you very much for your time and suggestions.

Centre for Commercial Law Studies (CCLS)

Queen Mary, University of London

Name : Tili Chen Email : tilichen@gmail.com

Interviewee: National Taiwan Library

I. Accessibility of website for visually impaired persons

☒Excellent ☐Good ☐Fair ☐Poor ☐Very Poor

II. Adequacy of the information are provided for visually impaired persons

☒Excellent ☐Good ☐Fair ☐Poor ☐Very Poor

III. What kind of the information do you have? (For example: Braille, audio books, and other equipments)

Braille, audio books, double-view books, blind computers, PDF books, EPBU books, DAISY, and projection machines

IV. How frequent do you contact with visually impaired persons?

☒Daily ☐Weekly ☐Monthly ☐Never

V. Do you understand the Marrakesh Treaty?

☐Yes ☒A little ☐No

VI. Do you understand any other legislations about the visually impaired persons?

☐Yes ☐A little ☐No

VII. How do you implement the relative legislations (included the Marrakesh Treaty and other legislations) about the visually impaired persons?

We implement the People with Disabilities Rights Protection Act, Copyright Act, and Library Act.

VIII. Do you have any samples of copyright license agreement with copyright holders or readers?

We make relative policy for the visually impaired persons.

IX. What difficulties do you encounter when you implement the relative legislations about the visually impaired persons? What do you think about the pros and cons of the Marrakesh Treaty for improving the access for the visually impaired persons? (For example: the international licensing of copyright works for visually impaired persons)

We suggest designing a legal licensing system, including user charges. Because the key issue around access rights for visually impaired persons is that there are simply too few works for them to access, not they—not that they do not want to pay for such works. Moreover, the government should encourage public or private sectors to provide the relative resources.

X. Do you have any cooperative partners on improved access published works for visually impaired persons? (For example: Accessible Books Consortium or Interlibrary Loan)

Interlibrary Loan

XI. Do you have any plans in the future about how to increase in kind and number of books available for visually impaired persons? Moreover, what are your considerations for implement such plans? (For example: cost savings or online licensing environment for copyrighted works)

Yes, we still try to improve the accessible environment for the visually impaired persons and strive for more cooperation with other libraries.

APPENDIX2

QUESTIONNAIRE

Through this brief questionnaire, your answers will be helpful in enhancing my research. Your response will only be used for research purposes.

Thank you very much for your time and suggestions.

Centre for Commercial Law Studies (CCLS)

Queen Mary, University of London

Name : Tili Chen Email : tilichen@gmail.com

Interviewee: Taipei Public Library

I. Accessibility of website for visually impaired persons

■Excellent ☐Good ☐Fair ☐Poor ☐Very Poor

II. Adequacy of the information are provided for visually impaired persons

■Excellent ☐Good ☐Fair ☐Poor ☐Very Poor

III. What kind of the information do you have? (For example: Braille, audio books, and other equipments)

Braille, audio books, double-view books, blind computers, guided blind mouse, and projection machines

IV. How frequent do you contact with visually impaired persons?

■Daily ☐Weekly ☐Monthly ☐Never

V. Do you understand the Marrakesh Treaty?

■Yes ☐A little ☐No

VI. Do you understand any other legislations about the visually impaired persons?

■Yes ☐A little ☐No

VII. How do you implement the relative legislations (included the Marrakesh Treaty and other legislations) about the visually impaired persons?

Follow the Article 53 (1) of the Copyright Act

VIII. Do you have any samples of copyright license agreement with copyright holders

or readers?

No

IX. What difficulties do you encounter when you implement the relative legislations about the visually impaired persons? What do you think about the pros and cons of the Marrakesh Treaty for improving the access for the visually impaired persons? (For example: the international licensing of copyright works for visually impaired persons)

Normal people cannot realise why they do not allow borrowing the relative resources (for the visually impaired persons). That means they do not understand the Copyright Act.

X. Do you have any cooperative partners on improved access published works for visually impaired persons? (For example: Accessible Books Consortium or Interlibrary Loan)

Accessible Books Consortium or Interlibrary Loan

XI. Do you have any plans in the future about how to increase in kind and number of books available for visually impaired persons? Moreover, what are your considerations for implement such plans? (For example: cost savings or online licensing environment for copyrighted works)

Yes, we will make more accessible works and buy more popular books. However, we must consider the cost.